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PROCEEDINGS UNDER SEAL

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1 (End of sealed portion.)

2 (Recess taken at 9:16 a.m.)

3 (Proceedings resumed at 9:26 a.m.)

4 (Proceedings were heard out of the presence of the jury:)

5 **THE CLERK:** Calling Civil 20-5671, Epic Games, Inc.
6 vs. Google LLC, and Multidistrict Litigation 21-2981, In re
7 Google Play Store Antitrust Litigation.

8 Counsel?

9 **MR. BORNSTEIN:** Good morning, Your Honor. Gary
10 Bornstein for Epic Games. I'm joined at counsel table by
11 Michael Zaken, Andrew Wiktor, Lauren Moskowitz, and Yonatan
12 Even.

13 **MR. POMERANTZ:** Good morning, Your Honor. Glenn
14 Pomerantz on behalf of Google, and with me at counsel table are
15 Michelle Park Chiu, Lauren Bell, Kate Smith, Jonathan Kravis,
16 and Kyle Mach.

17 **THE COURT:** Okay. Now, the jury binders have been set
18 up and you removed those preliminary instructions?

19 **MR. BORNSTEIN:** Yes, Your Honor.

20 **THE COURT:** Okay. So I'm going to distribute that
21 set. I'm assuming there are no objections to the preliminary
22 injunction.

23 No objections, Epic?

24 **MR. BORNSTEIN:** Correct.

25 **THE COURT:** Google?

1 **MR. POMERANTZ:** No objection.

2 **THE COURT:** All right. Let's bring the jury in. I
3 will instruct them, and then we're going to open.

4 (Proceedings were heard in the presence of the jury:)

5 **THE CLERK:** Please be seated.

6 **THE COURT:** We can skip calling the case.

7 **THE CLERK:** Okay.

8 **THE COURT:** Okay. Ladies and gentlemen, we're ready
9 to begin. You have your binder, which has notepaper.

10 And I'm going to give you the preliminary instructions.
11 It's kind of a roadmap on what you're going to see and hear
12 during trial. It's not the legal part. You're going to get
13 that at the end, but these are the preliminary ones. You'll
14 have a space in there to put these instructions. I'm going to
15 tell you more about that in a moment.

16 Now, also, when every witness comes up, you're going to
17 get a headshot, color headshot, with the witness' name that you
18 can put in your binder as well so that it helps you keep track
19 of who you've seen and, you know, you can make any notes you
20 want behind it or on lined paper, but you'll at least have a
21 visual reference on every witness that you're going to see in
22 court.

23 So I'm going to give you these instructions first, and
24 then we're going to hear opening statements from the parties if
25 they choose to do that, and then we'll start with our

PRELIMINARY JURY INSTRUCTIONS

1 testimony. There will be a half-hour lunch today.

2 Now before I leave -- before we leave today, I'll make
3 sure I understand what's happening for your lunches going
4 forward because we are going to provide them, but I'll let you
5 know by the end of the day today. Okay?

6 All right. Ms. Clark, these are ready to go.

7 All right. Members of the jury, now the instructions at
8 the beginning of the case here and at the end of the case are
9 vitally important. It's the last set you get at the end of the
10 case that's going to control your deliberations. This is a
11 roadmap so I want you just to clear your minds. You can listen
12 to me, you can read along; but whatever you do, I want to make
13 sure you're absorbing these instructions because they're going
14 to help you understand how the case is going to run.

15 So let's start with number one. You are now the jury in
16 this case. I'm going to take a few minutes to tell you about
17 your duties as jurors and to give you some preliminary
18 instructions before the testimony starts.

19 Now, at the end of the trial, as I said, I'll give you the
20 detailed written instructions that will control your
21 deliberations. These are the introductory instructions to help
22 you understand the principles that apply to civil trials and to
23 help you understand the evidence as you listen to it.

24 You will be allowed to keep these instructions to refer to
25 throughout the trial, and the instructions are not to be taken

PRELIMINARY JURY INSTRUCTIONS

1 home. They must remain in the jury room when you leave. In
2 fact, all of your binders will just stay in the jury room. You
3 can't take those home.

4 At the end of trial, I will collect these instructions and
5 give you the final set of instructions, and it is the final set
6 that will control your deliberations.

7 Now, it is your duty as jurors to find from the facts --
8 to find the facts from all of the evidence in this case and to
9 those facts you will apply the law as I give it to you. You
10 must follow the law as I give it to you whether or not you
11 agree with it.

12 You must not be influenced by any personal likes or
13 dislikes, opinions, prejudices, or sympathy. You should also
14 not be influenced by any person's race, color, religion,
15 national ancestry, or gender.

16 Would you lock that door, Lisa?

17 All of this means that you must decide the case solely on
18 the evidence before you. Please keep in mind that you took an
19 oath to do so.

20 Now, do not read into these instructions or anything I may
21 say or do that I have an opinion about the evidence or what the
22 verdict should be. That is for you to decide.

23 Now, to help you follow the evidence, I'm going to give
24 you a brief summary of the positions of the parties. Now, the
25 plaintiff, as I said, they sit closest to the jury. They're at

PRELIMINARY JURY INSTRUCTIONS

1 the table right in front of you. Plaintiff is Epic Games,
2 Inc., and it's going to be called Epic or Epic Games during the
3 trial. The defendants are Google LLC and some of its
4 affiliates, and they're going to be all referred to as Google.

5 Now, Epic says that plaintiff has violated federal and
6 state antitrust laws through a variety of means that foreclose
7 competition in an alleged market for Android app distribution
8 and in an alleged market for in-app billing services on Android
9 devices. Epic has the burden of proving these claims.

10 Epic alleges that Google's conduct harmed mobile app
11 developers and consumers by increasing prices and reducing
12 quality and innovation.

13 Google denies Epic's claims. Google says that the
14 relevant market is not limited to Android; that also includes
15 Apple's IOS and other platforms where users and developers can
16 engage in transactions for digital conduct.

17 Google further contends that its conduct has not
18 foreclosed competition but, rather, has promoted competition by
19 enabling Android to compete with the IOS and other platforms.
20 Google says that its conduct benefited users and developers.

21 Google also has counterclaims against Epic. Google
22 alleges that Epic willfully violated Google's payment policy;
23 and that by doing so, Epic violated its contractual obligations
24 to Google. Google alleges that Epic was unjustly enriched at
25 Google's expense. And Google has the burden of proving these

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1 counterclaims.

2 Epic denies Google's counterclaims. Epic contends that
3 Google's payment policy is illegal and a violation of antitrust
4 laws and Google, therefore, cannot enforce that policy.

5 Now, when a party has the burden of proving a claim or
6 affirmative defense by a preponderance of the evidence, it
7 means you must be persuaded that the evidence -- must be
8 persuaded by the evidence that the claim or affirmative defense
9 is more probably true than not true. You should base your
10 decision on all of the evidence regardless of which party
11 presented it.

12 Now, the parties in this case are corporations. All
13 parties are equal before the law and a corporation is entitled
14 to the same fair and conscientious consideration by you as any
15 party.

16 Under the law, a corporation is considered to be a person.
17 It can only act through its employees, agents, directors, or
18 officers. Therefore, a corporation is responsible for the acts
19 of its employees, agents, directors, and officers performed
20 within the scope of authority.

21 An act is within the scope of a person's authority if it
22 is within a range of reasonable and foreseeable activities that
23 an employee, agent, director, or officer engages in while
24 carrying out that person's business.

25 Now, the evidence you are to consider in deciding what the

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1 facts are consists of the sworn testimony of any witness, the
2 exhibits that are admitted into evidence, any facts to which
3 the lawyers have agreed, and any facts that I may instruct you
4 to accept as proved.

5 Now, in reaching your verdict, you may consider only the
6 testimony and exhibits received into evidence. Certain things
7 are not evidence, and you may not consider them in deciding
8 what the facts are. I'm going to tell you what is not
9 evidence.

10 This is the first and foremost one. Arguments and
11 statements by lawyers are not evidence. The lawyers are not
12 witnesses. What they may say in their opening statements,
13 closing arguments, and at other times is intended to help you
14 interpret the evidence but it is not evidence. If the facts as
15 you remember them differ from the way the lawyers have stated
16 them, your memory controls.

17 Number two, questions and objections by lawyers are not
18 evidence. Attorneys have a duty to their clients to object
19 when they believe a question is improper under the rules of
20 evidence. You should not be influenced by the objection or by
21 my ruling on it.

22 Number three, testimony that is excluded or stricken or
23 that you are instructed to disregard is not evidence and you
24 must not consider it.

25 In addition, some evidence may be received only for a

PRELIMINARY JURY INSTRUCTIONS

1 limited purpose. When I instruct you to consider certain
2 evidence only for a limited purpose, you must do so and you may
3 not consider that evidence for any other purpose.

4 And, number four, anything you see or hear when court is
5 not in session is not evidence. You are to decide the case
6 solely on the evidence received at trial.

7 Now, evidence may be direct or circumstantial. Direct
8 evidence is direct proof of a fact, such as testimony by a
9 witness about what that witness personally saw or heard or did.
10 Circumstantial evidence is proof of one or more facts from
11 which you could find another fact. You should consider both
12 kinds of evidence. The law makes no distinction between the
13 weight to be given to either direct or circumstantial evidence.
14 It is for you to decide how much weight to give any evidence.

15 Now, the parties have agreed to certain facts that I will
16 now read to you. Now, these are agreements between the
17 parties. They're carved in stone. They're rock solid. You
18 can bank on them. They're not going to -- these are facts now
19 that you will treat as true.

20 Number 1 -- and, by the way, some of these will make more
21 sense as the case develops, but you'll always have this page to
22 remember. These are carved in stone.

23 Number 1, Google LLC is a wholly owned subsidiary of
24 Alphabet, Inc.

25 Number 2, Google offers various products and services,

PRELIMINARY JURY INSTRUCTIONS

1 including Android OS, Chrome, Gmail, Drive, Maps, Play, Search,
2 YouTube, Google Cloud, and Search Ads 360.

3 3, a mobile operating system, known as OS, provides
4 multipurpose computing functionality to a mobile device, such
5 as a smartphone or a tablet.

6 Number 4, to be useful to consumers, a mobile OS must be
7 able to run software application or apps.

8 Number 5, a mobile OS facilitates the use of apps through
9 code, such as application programming interfaces, APIs, which
10 app developers use to create apps that are compatible with the
11 OS.

12 6, an app is software separate from the mobile OS that
13 runs on a mobile device and adds specific functionalities to a
14 mobile device.

15 7, consumers use apps to perform a variety of tasks on
16 their mobile devices.

17 8, entities that manufacture mobile devices, such as
18 Samsung or Motorola, are referred to as original equipment
19 manufacturers or OEMs.

20 9, OEMs preinstall an OS on the mobile devices that they
21 manufacture and sell.

22 10, instead of developing their own OS, almost all OEMs
23 today license a third party's OS for their devices.

24 11, Apple does not license IOS to other OEMs.

25 12, the Google Store is an app store owned by Google that

PRELIMINARY JURY INSTRUCTIONS

1 distributes apps on devices running the Android OS.

2 13, to distribute an app on the Google Store, app
3 developers must first enter into Google's Developer
4 Distribution Agreement, which will be known as the DDA.

5 14, the predecessor to the Play Store was called
6 Android Market.

7 15, Google acquired the Android mobile operating system in
8 2005.

9 16, Google launched Android Market on October 2008.

10 17, Google launched its in-app billing service in 2011.

11 18, Google's Android Market app store was rebranded as
12 Google Play Store in March 2012.

13 19, Timothy Sweeney is Epic Games' controlling
14 shareholder, CEO, and board chairman.

15 20, in April 2020, Epic made the decision to make Fortnite
16 available for download through the Play Store.

17 21, Epic signed Google's DDA.

18 And, 22, on August 13, 2020, Epic filed its complaint
19 against Google. The complaint is the document that starts this
20 case.

21 Now, there are rules of evidence that control what can and
22 cannot be received in evidence. When a lawyer asks a question
23 or offers an exhibit in evidence and a lawyer on the other side
24 thinks that it is not permitted by the rules of evidence, that
25 lawyer may object. If I overrule the objection, the question

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1 will be answered and the exhibit received.

2 If I sustain the objection, the question will not be
3 answered and the exhibit will not be received. Whenever I
4 sustain an objection to a question, you must ignore the
5 question and must not guess what the answer might have been.

6 Sometimes I may order that evidence be stricken from the
7 record or that you disregard or ignore the evidence. That
8 means when you are deciding the case, you must not consider the
9 evidence that I told you to disregard.

10 Now, in deciding the facts of this case, you may have to
11 decide which testimony to believe and which testimony not to
12 believe. You may believe everything a witness says or part of
13 it or none of it.

14 In considering the testimony of any witness, you may take
15 into account the opportunity and ability of the witness to see
16 or hear or know the things testified to; the witness' memory;
17 the witness' manner while testifying; the witness' interest in
18 the outcome of the case, if any; the witness' bias or
19 prejudice, if any; whether other evidence contradicted the
20 witness' testimony; the reasonableness of the witness'
21 testimony in light of all the evidence; and any other factors
22 that bear on believability.

23 Now, sometimes a witness may say something that is not
24 consistent with something else he or she said. Sometimes
25 different witnesses will give different versions of what

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1 happened. People often forget things or make mistakes in what
2 they remember. Also, two people may see the same event but
3 remember it differently.

4 You may consider these differences but do not decide that
5 testimony is untrue just because it differs from other
6 testimony. However, if you decide that a witness has
7 deliberately testified untruthfully about something important,
8 you may choose not to believe anything the witness said. On
9 the other hand, if you think the witness testified untruthfully
10 about some things but told the truth about others, you may
11 accept the part you think is true and ignore the rest.

12 The weight of the evidence as to a fact does not
13 necessarily depend on the number of witnesses who testify about
14 it. What is important is how believable the witnesses were and
15 how much weight you think their testimony deserves.

16 Now, times during the trial you may hear testimony by a
17 witness in the form of a previously recorded deposition rather
18 than live here in court. It will usually be on a video. So
19 you'll see a video of somebody testifying.

20 A deposition is the sworn testimony of a witness taken
21 before trial. The witness was placed under oath to tell the
22 truth, and lawyers for each side ask questions. The questions
23 were answered and recorded.

24 Insofar as possible, you should consider deposition
25 testimony presented to you in court in lieu of live testimony

PRELIMINARY JURY INSTRUCTIONS

1 in the same way as if the witness had been present to testify.

2 Now, you're also going to hear testimony from individuals
3 known as expert witness who testify to their opinions and the
4 reasons for their opinions. This opinion testimony is allowed
5 because of the education or experience of the witness. Such
6 testimony should be judged like any other testimony. You may
7 accept it, you may reject it, and you can give it as much
8 weight as you think it deserves considering the witness'
9 education and experience, the reasons for the opinion, and all
10 the other evidence in the case.

11 Now, at times you're going to see some charts and
12 summaries that will be shown to you to help explain the
13 contents of books and records and documents or other evidence.
14 Some of those charts or summaries may be admitted into
15 evidence, some may not. Charts and summaries are only as good
16 as the underlying evidence that supports them. You should,
17 therefore, give them only such weight as you think the
18 underlying evidence deserves.

19 Now, you're going to need to pay close attention. That's
20 why you got notepaper and we're going to be taking frequent
21 breaks and you're going to be hydrated and nourished all so
22 that you can maintain your focus. That is because you will not
23 get a transcript of the trial testimony during deliberations.
24 Okay? You will not get that. You're not get a big book of
25 what everybody said, so it's vitally important you pay close

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1 attention to the testimony as it's given.

2 Now, as I mentioned, if you like you may take notes to
3 help you remember the evidence. Your binder has notepaper in
4 it for that. If you do take notes, keep them to yourself until
5 you go to the jury room to decide the case. That's at the very
6 end, so don't share notes at the end of the day or anything
7 like that. Don't let note taking distract you.

8 And when you leave, your notes should be left in the jury
9 room. No one's going to read them. That's a sacred space
10 nobody goes into except to do a little cleaning.

11 Whether or not you take notes, you should rely on your own
12 memory of the evidence. Notes are only to assist your memory.
13 You should not be overly influenced by your notes or those of
14 other jurors.

15 Now, when the question -- when the attorneys have finished
16 examining a witness, you may propose a question to the witness
17 to help clarify the testimony. Now, a question may not be used
18 to express an opinion about the testimony or argue with a
19 witness. Okay? So let me just go over the top here for a
20 moment.

21 Don't give me a question that says "Why are you lying?"
22 Okay. This is -- here's a good question: Could you repeat the
23 date on which that event happened again? Or: You said that
24 there was black at the beginning of the testimony, but I
25 thought I heard you say it was red at the end. Can you

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1 clarify? No arguing. No expressing opinions. If you propose
2 a question, remember that your role is that of a neutral fact
3 finder, not an advocate.

4 Before I excuse each witness, I will offer the opportunity
5 to write out a question in the form that has been put on
6 your -- in your binders. You should have a question form in
7 there. Do not sign the question. Don't put your name on it.
8 Okay?

9 Now, there are some proposed questions that I will not
10 permit or I will rephrase them from the way they were written.
11 This might happen either due to the rules of evidence or other
12 legal reasons or because the question is expected to be
13 answered later in the case. If I don't ask your question or if
14 I rephrase it, don't try to guess or speculate about why.

15 Don't give undue weight to questions you or other jurors
16 propose, and you should evaluate the answer to any questions in
17 the same manner you evaluate all the other evidence.

18 Now, I'm giving you the opportunity to ask questions. I'm
19 not suggesting or requesting that you do so. It will often be
20 the case that a lawyer has not asked a question because it is
21 legally objectionable or because a later witness may be
22 addressing that subject.

23 Now, this is a particularly vital instruction. They're
24 all equally important, but I want you to pay particular
25 attention to this one.

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1 Let's talk about how you're going to conduct yourself as
2 jurors. Now, it is vitally important that you keep an open
3 mind throughout the trial. The testimony and the evidence is
4 going to unfold over several weeks, and you should not reach
5 any conclusions before you have heard everything that will be
6 presented.

7 In addition, do not decide what the verdict should be
8 until you and your fellow jurors have completed your
9 deliberations at the end of the case.

10 Now, when it comes time for you to decide the verdict,
11 your decision must be based on the evidence received in the
12 case and on my instructions about the law that applies. You
13 must not be exposed to any other information about the case or
14 to the issues it involves during the course of your jury duty.

15 So for these reasons do not communicate with anyone in any
16 way and do not let anyone else try to communicate with you in
17 any way about the merits of the case or anything to do with it.
18 This covers every possible form of communication: In person,
19 in writing, by phone, tablet, computer, any electronic means
20 via e-mail, text messaging, chat rooms, blogs, websites, any
21 social media applications including, but not limited to,
22 Facebook, YouTube, Twitter, X, Instagram, LinkedIn, Snapchat,
23 TikTok. I try to stay current. I don't use social media. You
24 get the idea. No social media hooks.

25 The prohibition on communication applies to everyone,

PRELIMINARY JURY INSTRUCTIONS

1 including your family members, your employer, and the media or
2 the press, and anybody involved in the trial. It also applies
3 to communicating with your fellow jurors until I give you the
4 case for deliberation.

5 Now, you're certainly free to tell your family and your
6 employer that you have been seated as a juror in the case and
7 how long you expect the trial to last, but that is it. You
8 can't go any farther than that. You cannot share with them or
9 anyone else any other information about your jury service or
10 about the case. If anyone asks you or -- and tries to get any
11 information out of you, you must say that I have instructed you
12 not to discuss the matter and you must tell Ms. Clark right
13 away. That would be a breach that I need to follow-up on, so
14 you must tell Ms. Clark.

15 In addition, you must not for any reason do any research
16 or investigation on your own. You will get all the evidence
17 and legal instruction you may properly consider for the verdict
18 right here in court.

19 Do not look up anything on the Internet or in a book.
20 Don't do any sleuthing or investigating of any sort. Do not
21 visit or view any place or location that might be described in
22 the case. Do not do any research about the law or the people
23 involved, including the parties, the witnesses, the lawyers, or
24 me.

25 Also, there's going to be media coverage of this case.

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1 There may be a substantial amount of it. It is very important
2 that you do not read, watch, or listen to any news or media
3 accounts or commentary about this case or anything to do with
4 it. If you see it, don't read it. If you hear it, turn it
5 off. If you happen to read or see anything touching on this
6 case in the media, turn away and you should let Ms. Clark know
7 so I can make sure that we're all set and there's not a
8 problem.

9 Now, I understand this is a long list of things not to do,
10 but it is vitally important that you follow these rules. They
11 protect each party's right to have this case decided only on
12 the evidence that is presented here in court.

13 Witnesses in court take an oath to tell the truth and the
14 accuracy of their testimony is tested during the trial process.
15 If you do any research on investigation outside the courtroom
16 or gain any information through improper communications, then
17 your verdict may be influenced by inaccurate, incomplete, or
18 misleading information that has not been tested by the trial
19 process.

20 Each of the parties here is entitled to a fair trial by an
21 impartial jury; and if you decide the case based on information
22 not presented in the court, you will have denied a party's
23 right to a fair trial.

24 Remember that you have taken an oath to follow this rule,
25 and it is crucial that you follow this rule and all the other

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1 ones I've outlined today.

2 Now, a juror who violates these restrictions jeopardizes
3 the fairness of these proceedings and a mistrial could result
4 that would require the entire trial process to start over.

5 Now, if any juror is exposed to any outside information
6 and it comes to your attention, please let Ms. Clark know right
7 away.

8 All right. We're just about ready to start the trial.
9 We're going to get to opening statements. Each side may make
10 an opening statement. Now, as I said before, these are the
11 lawyers talking, and an opening statement is not evidence. It
12 is an outline to help you understand what the party expects the
13 evidence will show.

14 A party is not required to make an opening statement; and
15 if a party chooses not to, you should not hold it against that
16 party for any reason.

17 Now, Epic -- once the opening statements are done, Epic
18 will then present evidence and counsel for Google may
19 cross-examine. Then Google will present its evidence, and
20 counsel for Epic may cross-examine. And after all the evidence
21 has been presented, I will instruct you on the law that applies
22 to the case and the attorneys will make their closing
23 arguments; and after that, you will go to the jury room to
24 deliberate on your verdict.

25 So that is the end of these instructions, and let's have

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1 our opening statement.

2 Epic?

3 **MR. BORNSTEIN:** Your Honor, may I proceed?

4 **THE COURT:** Please.

5 **MR. BORNSTEIN:** Thank you.

6 **OPENING STATEMENT**

7 **MR. BORNSTEIN:** Hi. Good morning, everybody. My
8 name's Gary Bornstein, and together with the folks at this
9 table here I represent Epic Games, the plaintiff in the case.

10 And as the Court said, this opening statement is an
11 opportunity for me to give you an outline of what the evidence
12 will be and to do my best to tell you what we believe the
13 evidence will prove, and so I'll start just with what the case
14 is about.

15 The case is about Google and it's in particular about a
16 store that Google has on Android phones called the Google Play
17 Store. That's the icon there. And it's about how Google has
18 gone about systematically, deliberately, and unlawfully
19 preventing all competition against the Google Play Store and
20 how as a result, it has caused harm. It has harmed consumers,
21 who have less choice and pay more. It has harmed app
22 developers like Epic Games but like thousands and thousands of
23 others, and it has harmed people who would like to have stores
24 of their own on Android devices but can't.

25 So let me tell you what I mean. I'll clear the phone off

1 here.

2 The phone all by itself, it doesn't do very much; right?
3 What brings the phone to life are the apps that we put on it;
4 right? We get to personalize the phone.

5 You have on there what you might need for work or for
6 school, things you find fun, things to communicate with your
7 friends and family, but how do those apps get there; right?
8 This is where we have the problem that I'm going to talk about
9 today.

10 On Android smartphones, which are used by billions and
11 billions of people around the world, the primary place that
12 people go to get their apps is the Google Play Store, the icon
13 I showed before.

14 This chart shows you the extent to which the Google Play
15 Store dominates Android phones. So the green bars over the
16 course of the year are the number of installs of apps from the
17 Google Play Store; and the little gray part on top, less than
18 10 percent, 5 percent, that's all other stores besides the
19 Google Play Store.

20 Now, the Google witnesses will tell you during this trial
21 that there are alternatives. They will tell you that over
22 60 percent of all Android phones have another store sitting
23 right next to it. They're talking about Samsung. Let me show
24 you what they're talking about. That little orange sliver,
25 that is all that Samsung, the largest Android OEM by far, has

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1 been able to achieve.

2 So why does it matter; right? Why does it matter that
3 there's only one store? You may think: That's what phones are
4 like. I go to the app store. I go to the Google Play Store
5 when I need to get an app on my phone. But why? Why is there
6 just one place to shop?

7 Think about a regular computer -- right? -- if you have a
8 laptop or a desktop. You can go anywhere to get your software.
9 You can go to a website and get it directly from the developer.
10 You can get the Chrome browser from Google just by going to a
11 Google website and put it on your computer. You can go to lots
12 of different stores that are on your computer.

13 So why is this computer different? Right? Why is this
14 one built some other way? And make no mistake about it. This
15 is a computer. Right? This is probably the most important
16 computer in your lives, more so than anything else. So why is
17 it different?

18 The answer to that question is power. Google has such
19 extraordinary power over Android phones that it can use two
20 strategies, two strategies you'll hear about a lot, to prevent
21 all other competition and maintain those big, big green bars.

22 Here's what those strategies are: Bribe or block. Bribe:
23 What I mean is, and you will see this again and again, Google
24 pays potential and actual competitors not to compete, literally
25 gives them money and other things of value. It's like if this

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1 were a race, if competition were a road race or a foot race,
2 it's like Google saying "Here's \$360 million" -- and that's an
3 actual number you'll hear about -- "Here's \$360 million, why
4 don't you sit this one out? Let me run. Let me win." That's
5 bribe.

6 Block: Here's the alternative. What Google does is it
7 blocks competitors from even being able to compete no matter
8 how good their products are.

9 So, for example, as the evidence will show, if you would
10 like to get another store on your phone besides the Google Play
11 Store if it's not already there, you have to go through kind of
12 tapping screen after screen after screen, you have to go
13 through warnings that say that your phone may be damaged by the
14 software you installed. Google makes it hard. Google makes it
15 a challenge to put a competitor on the phone.

16 Again, if competition were like a race, it's like Google
17 gets to run on a nice, smooth track and everyone else is forced
18 to run in quicksand.

19 So we'll give you specific examples of bribe and block,
20 paying people off and preventing them from competing. These
21 are the ways that Google maintains those big green bars, and
22 that is why we're here.

23 So why does it matter? One reason that this matters is
24 that, as you'll hear as the trial goes on and get the
25 instructions from the judge, it violates the law. As you will

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1 learn, when a company has the kind of power that Google has, it
2 is not allowed to use that power to prevent other companies
3 from having a fair chance to succeed. Right?

4 Big companies, of course they're allowed to compete. If
5 they can do the best and they can win that way, like, great.
6 Good for them. But they are not allowed to use their power to
7 stop everybody else from trying. The law draws a line between
8 fair competition and unfair competition between what you're
9 allowed to do and what violates the antitrust laws, and Google
10 has crossed that line again and again.

11 And there is a practical side to it too. This is not just
12 an abstract legal exercise. When there's no competition, bad
13 things happen; and I'm going to illustrate the point with
14 something that is fundamental to many peoples lives as their
15 phones. Ice cream.

16 So here's a happy little town where there are lots of
17 different places to shop for ice cream. These stores need to
18 compete against one another to win your business. Right? To
19 get you to go to Lizzie's rather than Clark's, they've got to
20 have tastier ice cream. They've got to have more flavors.
21 They've got to have better service. They've got to have lower
22 prices. Something to bring you in the door. That's how
23 competition works because if not, you'd go somewhere else. So
24 as a result, prices go down, that's good; quality goes up, also
25 good.

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1 Now, let's go back to my happy little town and let's make
2 it sad. There's only one place to get ice cream now. So what
3 does this one ice cream store have to do to compete? Very
4 little. There's not really any other place to go unless you
5 want to get in your car and go a long, long distance away.

6 So as a result, because there is no threat that you will
7 take your business elsewhere, they don't have to make better
8 ice cream, they don't have to have better service, and they
9 don't have to have lower prices. So prices go up, quality goes
10 down. And that is exactly what has happened on Android phones.

11 Let me talk about prices first. It would help if I hit
12 the right button. There we go.

13 Let me talk about prices first. So prices are high. If
14 you want to buy some cool stuff on your phone, this is what
15 happens on an Android device from the Google Play Store. You
16 push the purchase button and the money then goes to the
17 developer, but along the way Google takes a 30 percent cut. In
18 some instances up to 30 percent of the money goes to Google.
19 And it's not just when you make that first purchase or when you
20 make that first download. It's forever. Again and again
21 repeatedly Google takes 30 percent every time you make a
22 purchase of digital goods on your phone.

23 Google knows 30 percent is too high. This is a Google
24 document. People internally at Google, senior executives
25 acknowledge that the value they're giving to developers is not

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1 aligned with what developers pay. They call the 30 percent
2 arbitrary.

3 And it's not just the developer who suffers. Right?
4 Consumers suffer too. Think about like when the price of gas
5 goes up; the price of airline tickets goes up; the price of
6 avocados go up means the price of guacamole goes up; right? If
7 the costs go up, the prices goes up to all of us.

8 Later today you will hear from a developer who will come
9 in and tell you how the costs that he faced on Google Play
10 caused his prices to go up to consumers.

11 In addition, the quality on Google play is lower than it
12 would be than if there was competition. And as the trial goes
13 on, including today, you will hear developers explain that to
14 you too and tell you about their experience.

15 So the result of what Google is doing is higher prices,
16 lower quality, and less choice for everyone all while Google
17 makes billions and billions in profits, more than it would make
18 in a competitive market.

19 And I want to be very, very clear about this. I do not --
20 we do not, Epic does not fault Google for making money. We
21 fault Google for the actions that it has taken. We fault
22 Google for again and again repeatedly when it sees competition
23 not trying to make its store better but turning to the bribe or
24 block strategy.

25 So let me explain this in a little bit more detail. I

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1 want to go back to my phone, and I want you to pretend that you
2 are the company that makes the phone, Samsung, Motorola, Sony,
3 whoever it may be. You manufacture this, and it's just a piece
4 of hardware. It's glass. It's metal, chips, and a battery.

5 To make it work, you need some software called an
6 operating system. This is the first layer of software that
7 goes between the phone and the apps that you put on it and
8 allows the apps to run. You have to have the operating system.

9 So where does the operating system come from? There's one
10 major phone maker that makes their own. That's Apple makes
11 IOS. And every other major phone maker in this country and
12 most countries around the world uses Android.

13 So this slide, it shows you over time starting from 2007
14 when there were lots of choices, the gray stuff, when
15 smartphones were just beginning, over time all the way to close
16 to today, because that's as far as the data I have goes, you
17 will see by the end it's just Apple in blue and Android in
18 green.

19 And Android, the green one, has the vast majority of
20 phones in the world. There were other ones in the past. Now
21 if your name is not Apple and you're a phone maker, Android is
22 your only choice.

23 To be clear, others have tried, very large companies --
24 Microsoft, Amazon -- have tried to develop competing operating
25 systems for phones, and they have failed.

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1 So, again, pretend that you need to get an operating
2 system for that phone that I showed you. If your name's not
3 Apple, you have to go to Google. If you want that little green
4 guy, the trademark there, if you want Google maps, if you want
5 Gmail, if you want YouTube all to be on the phone that you make
6 when you have your consumers take it out of the box, Google is
7 your unavoidable trading partner. And just like the ice cream
8 stores, when there's no competition, the seller gets to extract
9 a price. The seller has power to do that.

10 Now, here the price that Google extracts is not money. It
11 extracts promises from the phone makers; promises to advantage
12 other parts of Google's business, including Google Play.

13 So, first, Google requires the phone makers who take
14 Android to put Google Play on the phone in a prominent
15 position; right? It has to be on the default home screen --
16 that's the home screen that opens up when you open your phone
17 for the first time -- and it's got to be right there.

18 Now, Google has long promised that Android is what it
19 calls an open platform. So there should be lots of other
20 choices even if Google Play is right there on the home screen,
21 but that is a promise that Android and Google have not kept.

22 I will show you how Google has gone through and closed off
23 each and every other loose end, each and every other option to
24 get around Google Play for app distribution on Android.

25 So alternative number one, something called direct

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1 distribution. This is a way that in theory you can get an app
2 on your phone. It means you go to a website that a developer
3 has, whether it's Epic Games or anybody else, and you try to
4 download the app onto your Android phone. Well, Google has
5 blocked this option. Remember bribe or block? The way it
6 blocks it is not a complete and total it's completely
7 impossible you can't do it, it just makes it really, really,
8 really hard.

9 So, for example, when Fortnite, Epic's game, launched on
10 Google Play -- excuse me -- launched on Android in 2018, this
11 is what people had to go through to get Fortnite onto their
12 phone from the Epic Games' website. They had to go through 16
13 screens; push and push and push and push and push and push. On
14 Google Play, it was super easy; a push or two. And it wasn't
15 just how many screens people had to go through. Look at what
16 some of these screens actually did.

17 Here's one. Google required a warning that said your
18 phone is not allowed to install unknown apps, and you had to go
19 through settings to change that.

20 Here's another one. Your phone and personal data are
21 vulnerable to attack by unknown apps, and you had to approve
22 that too.

23 So lots of people gave up. They did not go through the
24 process of direct distribution; and as you can see, this was
25 not an option.

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1 And I want to be clear. You saw the words "unknown apps."
2 At that time 2018, Fortnite was the biggest game in the world.
3 It was not an unknown app. Google knew exactly who Epic was,
4 but it labeled Epic, it labeled Amazon, it labeled Netflix,
5 Facebook, Microsoft, anybody who you downloaded an app from
6 outside the Google Play Store, Google called it unknown so it
7 could put up warnings just like those.

8 So here's another alternative. In theory, there could be
9 other stores. Google blocks those too in much the same way.
10 If you want to get another store on your phone and it's not
11 there when you open it up, you have to go through that whole
12 process of tap, tap, tap all the way past the warnings and kind
13 of persist and persevere to get the alternative store on your
14 phone. Google knows that is very hard to do.

15 Here's another Google document I'll show you. Amazon,
16 which was trying to start an app store -- right? -- not like
17 where you go buy shoes and books and stuff, like an app store
18 that competes with Google Play, they tried. They were giving a
19 15 percent discount; and as you can see, right underneath the
20 15 percent discount it says: Switching hurdle is too high for
21 most users because it took 14 steps. People just didn't make
22 it even though they could have saved 15 percent.

23 It's sort of like if you have two stores, here's
24 Google Play, here's Amazon, and Google throws up when the guy
25 comes by a danger sign in front of the Amazon store because

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1 it's supposedly unknown. Which place are most people going to
2 go shopping? They don't go past the danger sign. So this,
3 too, not a realistic option.

4 Last choice, in theory, preinstallation. That means the
5 alternative store is already on your device when you get it
6 from the manufacturer. This, too, is not a real path. Here
7 it's bribe, not block, although there is a bit of block too in
8 a way I'll explain.

9 What do I mean by the bribe? Google literally pays most
10 phone makers in the world not to preinstall competing app
11 stores. I'll say it again. They pay people not to allow
12 competition. They pay people not to compete on their own.
13 These agreements, they're called RSA 3.0. You'll hear a lot
14 about them during the course of the trial.

15 It's a bribe. It's also a block in the sense that it's a
16 bribe to the phone maker so they don't have their own app
17 stores on there, but it's a block because it prevents other
18 competing stores from being on those phones.

19 The only phone maker, the only major phone maker of any
20 size that anyone's ever heard of that doesn't have one of these
21 agreements today is Samsung, but Google had a plan for that
22 too, which I will explain in just a little bit.

23 So this, too -- oh, this is just to show you how much
24 money was paid for these exclusive RSA 3.0 agreements.

25 It starts out with tens of millions of dollars, makes it

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1 way up to hundreds of millions of dollars. And this is just
2 for a portion of what they ultimately provided to get
3 exclusivity, as you can see underlined, for Google Play. So
4 this, too, not a realistic option.

5 So what does Google do now that it has enshrined Google
6 Play Store on Android phones? Well, it takes billions and
7 billions of dollars in profit, and I'll explain how.

8 So Google has something that it calls Google Play Billing.
9 It's a separate product that it offers. It's a payment
10 solution. This is like if you're an app developer and you want
11 to sell things in your app, you need a way to handle the
12 financial side of things. You need a payment solution that
13 helps the credit cards talk to the banks and make sure you
14 have -- that the user has the money to buy whatever the user is
15 buying and then authorize it. There are lots of companies that
16 do this. You may know PayPal or Square and there are a bunch
17 of others. Some companies even do it on their own.

18 There should be choice. Developers should get to decide:
19 I want to do business with this one, but not do business with
20 that one. This one's a better price. This one's a better
21 service. Up to the developer or so it should be; and in some
22 instances even on an Android phone it is.

23 So Google draws a distinction between apps that sell
24 physical goods in the real world, like you want to get your
25 coffee from Starbucks or get a ride from Uber. Those app

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1 developers, they can choose their payment solution. It's up to
2 them.

3 But the app developers on the right that sell digital
4 goods, things in a game like Candy Crush, things on dating
5 sites where you can boost your profile and get seen more, or
6 things like news subscriptions at the *Chronicle*, these are
7 digital goods you use on your phone and these app developers,
8 they have no choice.

9 Let me show you what I mean. So here are a variety of
10 options that app developers might have if they had free rein of
11 payment solutions that they could choose from, different
12 prices, different service.

13 For the digital good sellers, Google takes all of these
14 options away. The only choice is to deal with a separate
15 Google-owned payment company. This is Google Play Billing.
16 It's actually owned by Google Payment LLC separate from the
17 Google Play Store. And because there is no competition, what
18 happens, just like the ice cream shop, the prices are insane;
19 15 percent or 30 percent depending on what the app developer is
20 selling.

21 And as we saw earlier, those prices are arbitrary. That's
22 Google's world. They don't match the value of what they are
23 delivering because there is no competition.

24 The impact of these extraordinary fees is extraordinary
25 profit. This is what Google has as operating profits and its

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1 profit margin on the Google Play Store. You can see that in
2 the latest year there it is over \$12 billion with a profit
3 margin of over 70 percent. These are extraordinary numbers.
4 They're particularly extraordinary in light of what Google said
5 when it started the app store. It said this publicly. This is
6 from a blog:

7 Google does not take a percentage. We went from "We don't
8 take a percentage" to over \$12 billion. And inside Google when
9 they started doing this years and years ago, they recognized
10 what was going on.

11 Here's Google -- someone internally at Google
12 acknowledging what happened: We are now lying. Right? We
13 have previously said we don't make money from Market. And as
14 you saw in those agreed facts that the judge read to you,
15 "Market" is an old name for the Google Play Store. We are now
16 lying to developers. They even say: Let me repeat. We are
17 now lying. When they got the power to do this, they used it,
18 they raised prices, and they brought quality down.

19 Now, along comes Epic. Epic is a software developer.
20 Fortnite being the most well known game. It also developed
21 something called the Unreal Engine, which is a software tool
22 that people can use to make their own games. It's used in
23 movies. It's used in TV. NASA even uses it for things. It's
24 a graphics tool.

25 Epic also has something called the Epic Game Store, which

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1 is a store that's available on PCs and Macs on your computer.
2 It's not on Android because of all the conduct that I've
3 described.

4 Epic has a history of challenging policies that it
5 disagrees with. You will hear about this later in the trial
6 from Mr. Tim Sweeney, who is the CEO and founder of Epic, who
7 is here with us in the courtroom. Mr. Sweeney founded Epic
8 when he was a college student living at his parents' house
9 mowing lawns. It's gotten a little bit bigger since then.

10 Fortnite in 2018 was, as I said earlier, the biggest game
11 in the world. If there were any game, if there were any app
12 that had the attention, the fan base, the ability to get around
13 all of the restrictions that I have described to be able to
14 distribute on Android outside of the Google Play Store, it was
15 Fortnite.

16 No one else had really tried to do it, but Epic believed
17 what Google was selling about Android being an open platform.
18 Remember I mentioned that before. Epic believed that they
19 could do it, could distribute Fortnite on Android devices to
20 users outside the Google Play Store.

21 They also saw it as the beginning of their ambitions to
22 get the Epic Game Store onto Android devices as well. And
23 later today you'll hear from a guy named Steve Allison.
24 Mr. Allison is the head of the Epic Game Store, and he'll talk
25 to you about the plans to get on Android and why they didn't go

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1 the way Epic had hoped.

2 Now, when Epic started down this road of launching
3 Fortnite on Android outside the Google Play Store, it did not
4 tell Google. It affirmatively kept it a secret. In fact, here
5 are Mr. Sweeney's instructions to his colleagues at Epic: Say
6 nothing till it ships. Very clear. Very clear. Because Epic
7 was going to compete with Google and you don't tell your
8 competitors your plans.

9 And you will see from the evidence that Epic was actually
10 concerned that if Google found out what was going on, Google
11 would try to squash it, and that turned out to be a very
12 well-justified fear. Because when Epic did ultimately tell
13 Google, and Epic did, Google turned to the bribe-or-block
14 strategy. It offered Epic benefits worth \$208 million just to
15 keep Fortnite or to put Fortnite on the Google Play Store.
16 Epic was not interested in being bribed. It was not interested
17 in a special deal. It said, "No, thank you."

18 Now, what Epic did not know at the time is that behind the
19 scenes at Google, when Epic made this decision to launch
20 Fortnite outside the Google Play Store, it was an "Oh, my gosh"
21 moment within Google. People saw this threat to the Google
22 Play Store, and they kicked into action to prevent it.

23 And what really got them, by the way, was not just that
24 Epic might go outside the Google Play Store, it was that other
25 people might do it too, and they called it contagion. Again

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1 and again contagion. Like competition is some kind of virus
2 that Google was afraid of.

3 This issue, it went all the way to the Business Council at
4 Google. It's a group of very senior executives who have to
5 approve certain decisions. They went to the Business Council
6 to get approval for that \$208 million payment.

7 And Google also established what it called a Fortnite Task
8 Force. This was a group of engineers and lawyers and press
9 people and senior executives at Google who were responsible for
10 monitoring the launch of Fortnite outside the Google Play Store
11 and taking action regarding that launch.

12 But Epic was just the beginning. Just the possibility of
13 Epic going outside the Google Play Store, it led to a flurry of
14 action within Google, including a series of strategies to bribe
15 or block.

16 So, first, one of the bribes. Epic -- excuse me -- Google
17 went out and identified a whole number of potential competitors
18 and paid them, paid them to keep their apps on the Google Play
19 Store; paid some of them not to launch a competing store at
20 all. This was called Project Hug, which I will get to in a
21 moment.

22 First, I just want to make clear, they considered at
23 Google the possibility of competing the regular way, competing
24 on price. And this is what they said: Ah, that's prone to be
25 a race to the bottom. I'm not going to do it. Instead they

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1 turned to Project Hug.

2 Project Hug, it's a cute name kind of because they grabbed
3 all of these potential competitors: Keep your friends close.
4 Keep your competitors closer. And they went back to the
5 Business Council, they got approval for hundreds and hundreds
6 of millions of dollars that ultimately became about a billion
7 to pay these developers. This whole set, 22 of them,
8 ultimately took these Hug deals.

9 Some of them, these three (indicating), they actually told
10 Google they were planning to start a competing store. They
11 were going to compete against the Google Play Store. They told
12 Google what they were going to do, and Google paid them not to
13 do so.

14 Now, Google's too smart, it's too careful, it's too well
15 lawyered to have an express written agreement that says "We
16 won't compete." That would be plainly illegal. But it is very
17 plain what happened.

18 Here, just one example, is what Google said internally.
19 Their focus was getting Riot, one of those developers, to shift
20 away from launching the op distribution platform, and Riot
21 agreed to put aside off-play distribution. Riot agreed not to
22 compete in return for tens of millions of dollars.

23 Even as to some of these other companies that had not
24 expressly told Google that they wanted to launch their own
25 store, this was still anticompetitive in a different way.

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1 These agreements required these developers not to launch any
2 app or even any content within a specific app anywhere outside
3 Google Play unless they also launched it on Google Play at the
4 same time.

5 So what that did is it made it impossible for other
6 stores, new stores that wanted to start, to have cool, new
7 exclusive content because anything they had was going to be
8 already on Google Play.

9 So if you're a new store and you want to bring people in,
10 you want to have an attraction, you want to have something
11 people can't get anywhere else. But because new stores
12 couldn't have all of these, the biggest developers out there to
13 get their games, the best a new store could do was a marketing
14 strategy like this, which is not very successful: We sell the
15 same things you can buy everywhere else. And that's what
16 Google did, is it forced competing stores to be in a position
17 where they could not have exciting, exclusive, different
18 attractive content. Google did all of this to prevent what it
19 called contagion and what the rest of us call competition.

20 There was a companion strategy to Hug, another bribe.
21 This one called Project Banyan. Remember I told you that
22 Samsung was the only major developer that didn't have one of
23 these RSA 3.0 agreements that prevented competing stores from
24 being preinstalled on the phone? Well, this was an effort to
25 deal with that.

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1 Google offered to pay Samsung again hundreds of millions
2 of dollars to effectively shut down its store. The deal was
3 complicated, but Samsung knew exactly what was going on. This
4 is what Samsung had to say about it: The goal was to prevent
5 unnecessary competition on the store. That's pretty clear.

6 Now, this deal was not signed in this form, but they found
7 another way. There was a separate deal not long after between
8 Google and Samsung where Samsung gets billions of dollars to
9 have the Google Play Store installed on the default home screen
10 of every Samsung phone; and if Samsung does not comply with
11 that obligation, it loses all that money.

12 The Samsung Galaxy Store is still technically allowed, but
13 Project Banyan shows you what the parties were intending and
14 you saw the result of it. Remember that little orange sliver
15 that -- on the top of that huge green bar; right? That's all
16 that Samsung has been able to achieve, and this is part of the
17 reason why.

18 So let me go back to Epic. Because of the restrictions
19 that I described, Epic really didn't have the success that it
20 wanted to on Android outside of the Google Play Store and
21 Google knew that. Google knew that Fortnite would have been
22 substantially more successful if it were on Play. So Epic did
23 finally launch Fortnite on the Google Play Store, it did, on
24 Google's regular terms; no special terms, no bribe.

25 But we are all here because Epic did not just give up.

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1 Epic did not stop trying to compete with Google. It decided to
2 stand up to Google because that's what you do to a bully. Epic
3 started something called Project Liberty. Freedom. Freedom
4 from Google's restrictions.

5 Project Liberty was a plan to challenge Google and Apple
6 too, two of the biggest companies in the world, to bring
7 attention to what they were doing to consumers and developers.
8 Epic knew this was going to be a long and hard fight. Epic
9 knew its business might very well suffer, but Epic believed
10 this was the right thing to do.

11 So as part of Project Liberty, Epic decided to compete
12 with Google even though Google's rules did not allow it. To
13 bring competition to Android, Epic decided to break the rules
14 that prohibited it.

15 So Epic launched a version of Fortnite that had a choice.
16 It had a choice of how you could pay. So a consumer who got
17 this choice could pay using Epic's payment solution for 7.99
18 for this product or the Google Play Store for 9.99. Epic said:
19 Here's choice. You choose us, you get a lower price.

20 Epic didn't tell Google about this in advance, once again.
21 To the contrary, Epic wrote the app in a way that it could
22 launch on the Google Play Store and then later activate this
23 choice using something called a Hotfix.

24 Google witnesses are going to make this sound very scary.
25 They are going to suggest that there was secret code embedded

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1 in the app. You will not hear any evidence that anyone was
2 harmed by this or even could have been harmed by this. The
3 only harm was to Google's pride. The only harm to Google was
4 that Epic showed the world the choice was possible. It even
5 put out a press release announcing that it was doing this.

6 Epic chose the splashy route. Epic chose the drama. Epic
7 believed this was the only way to bring attention to the world
8 to Google's practices, and Epic was completely right about that
9 but Epic has paid the price.

10 Like Google always does when Google faces competition, it
11 turned to bribe or block. Now, Epic had already said no to the
12 bribe. So instead we got the block. Fortnite got taken down
13 from the app -- from the Google Play Store immediately, and
14 it's been down in the three and a half years since this
15 happened.

16 And more than being blocked, Epic is being punished.
17 Google has countersued Epic. You heard there's a counterclaim
18 here in this case. Well, the evidence will show that that
19 counterclaim is just more of the same. It's Google doing what
20 it always does: Trying to enforce unlawful agreements, flexing
21 its muscles, wielding its power right here in the courtroom.

22 Now, the evidence is also going to show you why Google has
23 gotten away with this for so long. In part it's because Google
24 has been covering its tracks.

25 This is from a Google training document that employees are

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1 required to complete at their computers kind of clicking
2 through. Here's what it says (as read):

3 "Google knows that it is constantly in the public eye
4 and in the courthouse."

5 And what Google did is it deleted documents. It destroyed
6 evidence that it was legally obligated to preserve. It did it
7 on purpose and it did it in order to prevent you, the jury,
8 from seeing those documents.

9 When this case started, Google had a legal obligation to
10 preserve these documents to be considered by you and the Court
11 as evidence. Google violated that obligation. Google deleted
12 the documents on purpose.

13 I'll show you what they did. There's something at Google
14 called Google Chat. It's a way that Google employees and
15 executives communicate with one another. They use it all the
16 time. They use it every day to talk about important and
17 sensitive business substantive communications. You will hear
18 they actually used Google Chat because they knew that it was
19 going to be destroyed.

20 So the Chat feature has something called "History." When
21 history is on, the Chats are preserved. When history is off,
22 the Chats are destroyed after 24 hours. And this is not an
23 obscure feature that people at Google didn't know about. You
24 will see, they talk about it all the time. You will see they
25 actually comment on turning history off so that documents won't

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1 be discovered.

2 These are actual Chats at Google (as read):

3 "I talk about RSA-related things all day" -- remember
4 the RSA 3.0, the contract, the exclusive I talked
5 about? -- "and I don't have history on for all my Chats."
6 They actually say (as read):

7 "Will you turn it off? There's lots of sensitivity
8 with legal."

9 And look at the one on the bottom (as read):

10 "Would you turn history off? Would not like to have
11 a trail."

12 And to make matters worse, they laughed about it. This
13 was how they treated their preservation obligations. It would
14 have been the easiest thing in the world, by the way, for them
15 to turn it off. I mean, they're Google. Not only are they a
16 sophisticated company, they designed the Chat program. You
17 will hear from the witness, either today or tomorrow, that they
18 knew exactly how to turn it off and they could have done so.

19 But even after the case started, they continued to destroy
20 documents. Now, not all of the documents have been destroyed.
21 We have some. You've seen some in this presentation.

22 We are going to bring the witnesses in here and make them
23 answer questions about those documents. We will bring them in
24 in our case. We're going to have a number of Google witnesses
25 who we will bring in to question; and as you will see, the

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1 documents tell the real story even when the witnesses don't.

2 Now, we'll never know what was in the Chats that were
3 destroyed by the witnesses who you will meet. All we know is
4 that back in that training document and elsewhere, people at
5 Google were told to put their sensitive communications in Chat.

6 So we can't know what's in the documents. All we know is
7 that whatever is in them, as bad as the documents you will see
8 are, whatever is in the destroyed Chats, it's worse or at least
9 it was worse before they were destroyed.

10 So what is Google going to say? What will the Google
11 witnesses testify to you to defend its conduct? I'm going to
12 run through just a few things quickly.

13 One thing that the Google witnesses will say is that
14 Android is, in fact, open; that there's this 68 percent of
15 phones that ship with another store on them.

16 You already saw this slide. Clearly it's not so. Most,
17 vast majority of the app installs come from the Google Play
18 Store. So that's just not true.

19 Second, Google witnesses will testify that these
20 restrictions are actually good, that they were affirmatively
21 needed to prevent what they call fragmentation -- again, what
22 the rest of us call competition -- because having too many
23 stores would have been bad for Android, and they needed to do
24 all of this to get Android off the ground.

25 Well, the timing shows that to be wrong. Remember this

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1 slide? Way over on the right, Google's already huge; right?
2 They don't need to do anything to get Google off the ground.
3 It is the biggest operating system in the world by far.

4 This is when they engaged in a lot of the conduct I'm
5 talking about. Project Hug, Project Banyan, the RSA 3.0.
6 2019, they didn't need to get Android off the ground in 2019.
7 Android was already flying. So this, too, not the reason.

8 Another thing they will say, Apple is the competition;
9 they do this to compete against Apple. You're going to hear
10 that a lot; but, again, the documents tell the real story when
11 the witnesses don't.

12 Here (as read):

13 "Google executives acknowledge that the bear hug
14 effort" -- remember Project Hug -- "is to address
15 fragmentation" -- competition -- "within the Android
16 ecosystem."

17 Not Android versus IOS. This is about affecting
18 addressing competition within Android.

19 Here's another example, same point (as read):

20 "The existential question they were facing on
21 Project Banyan" -- you see that over on the left. "The
22 existential question is how to keep Play as the preeminent
23 distribution platform for Android."

24 And it doesn't make any sense either. I mean, on the left
25 you've got an iPhone. You can't get the Google Play Store on

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1 an iPhone. On the right, you have an Android phone. You
2 can't get the app store on an Android phone. They do not
3 compete in this way. So this, too, not the reason.

4 You will hear them say security is the goal. You will
5 hear witnesses come in and explain to you they need to protect
6 users from malicious apps and things like that. The evidence
7 will show that there are a lot of other ways to do that.

8 The computer science is a little heavy for a Monday
9 morning, but I will show you one example. Remember this?
10 Google says they have to use their payment system in order to
11 protect people from malicious payment systems and fraud; and,
12 yet, there are tons of apps already on Google Play Store that
13 don't have to use the payment system. They know that these
14 other options are not security risks. So that's not it.

15 Last one. You may hear Google say that things have
16 changed; that we don't charge 30 percent on everything anymore;
17 that we give people more choice. I want you to remember this
18 date: August 2020. That is when Epic launched Project Liberty
19 and the Hotfix. That is when Epic brought this lawsuit.

20 And so I want you to pay very careful attention as you
21 hear evidence about changes Google has made and whether they
22 were the result of competition or whether changes after
23 August 2020 were the result of something else like this
24 lawsuit.

25 Google witnesses are also going to say to you perhaps --

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1 so this is just not an answer.

2 Google witnesses are also going to say to you perhaps that
3 30 percent is typical; it's standard. If it's competitive, if
4 it's really a fair price, just let them compete. Why block
5 everybody else?

6 **THE COURT:** Counsel, we're at 45.

7 **MR. BORNSTEIN:** Oh. May I just do a quick wrap up,
8 Your Honor?

9 **THE COURT:** Yes, please, but we're at 45.

10 **MR. BORNSTEIN:** Thank you.

11 Just to go back to basics, what Google does is it uses its
12 power -- remember, bribe or block -- it harms developers, and
13 at the conclusion of this case you'll see it harms consumers,
14 and we will ask you to find that Google violates the law. We
15 won't ask you to award any money to Epic. We won't. We just
16 want things to be better for the future.

17 So I want to just thank you very much for listening, for
18 the sacrifice that you're making to be here to consider this
19 case, and for the attention you're going to give the evidence
20 for the next few weeks. So thank you.

21 **THE COURT:** Okay. Let's just stretch for a minute
22 before we get to the next one, and we'll take our break at
23 about 11:30. Okay? Probably do one witness, and then do lunch
24 maybe around 12:15 or something like that. Okay?

25 All right. Everybody okay with that?

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1 Okay. Good. Let's just stand up and...

2 (Pause in proceedings.)

3 **THE COURT:** Okay.

4 Counsel?

5 **MR. POMERANTZ:** Thank you, Your Honor.

6 **OPENING STATEMENT**

7 **MR. POMERANTZ:** Let me reintroduce myself. I'm Glenn
8 Pomerantz, I met you last Thursday, and I'll be representing
9 Google during this trial.

10 During this trial, we're going to prove three things, and
11 when we were together -- the first is that Google cannot be a
12 monopolist because Google competes.

13 When we were together last Thursday, I showed you these
14 two phones. This is an iPhone made by Apple (indicating).
15 This is an Android phone (indicating). It's the Galaxy phone
16 made by Samsung.

17 Now, in his opening statement Epic's lawyer spent almost
18 his entire opening talking about what happens on this phone,
19 the Android phone.

20 What the evidence is going to show is that the people
21 inside of Google think a lot about what happens on this phone,
22 the iPhone, and that's because Google competes with Apple.
23 And that competition is not just about how good is the camera
24 or how big is the screen, but it's also about the apps that we
25 put on our phones and how they get there.

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1 Apps allow us to do all sorts of things that we now expect
2 our phones to do. So imagine that you went and you bought an
3 Android phone, brought it home, took it out of the box, and
4 turned it on and you couldn't find the apps that you wanted or
5 you could find the apps that you wanted but they didn't work
6 very well or they had viruses; or every time that a new app
7 came out, your friends with an iPhone had it six months
8 before you had it. What would happen? Well, I'll tell you
9 what would happen. If that happened, you'd probably buy an
10 iPhone the next time around.

11 And because apps are so important to the quality of our
12 phones today, the competition between this phone and this phone
13 is also competition between the app stores where we get our
14 apps, between the Google Play Store and the Apple App Store.
15 And that competition between Google Play and the Apple App
16 Store, it's not just for consumers; it's also for the app
17 developers.

18 You're going to hear testimony from Google employees who
19 try to convince app developers to launch their apps first on
20 Android or at the very least to make their apps available in
21 the Google Play Store at the same time they make available at
22 the Apple App Store. That's competition between Google Play
23 and the Apple App Store.

24 Now, during this trial Epic is going to try to convince
25 you that maybe the phones compete but the app stores don't, but

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1 the evidence is going to show that Epic's wrong about this. In
2 this day and age, you cannot separate the quality of the phone
3 from the quality of the app store and the apps in those stores,
4 and that means that the Google Play Store and the Apple App
5 Store compete against each other.

6 Now, the second thing that we'll prove in this case is
7 that consumers and app developers have choices, and that
8 includes Epic. Let's take Fortnite, for example.

9 You'll see that Epic has lots of choices on where it can
10 distribute Fortnite: Game consoles like the PlayStation, Xbox,
11 Nintendo Switch, PCs, game streaming services like Nvidia's
12 GeForce, and Amazon Luna, and the Apple App Store.

13 And with Android, Epic has even more choices. Fortnite
14 can be downloaded directly onto an Android phone from Epic's
15 website. And if Epic wants to use an Android app store, well,
16 the Play Store is available and so is the Samsung Galaxy Store.

17 Every single Samsung phone comes with two app stores right
18 on the home screen and they're side by side: The Galaxy Store
19 and the Play Store. And you'll see that developers can choose.
20 They can put their app just in the Galaxy Store or just in the
21 Play Store or both. Epic chose to put their Fortnite game just
22 in the Galaxy Store for a while. And the Samsung user, if you
23 own a Samsung phone, you can choose either store with just a
24 touch.

25 And so when they show these charts that show all of these

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1 downloads from Play and not from the Samsung Galaxy Store,
2 that's because that's what the Samsung phone users are
3 choosing. They're touching Play. Nothing stops them from
4 touching the Samsung Galaxy Store. It's just that Play works
5 for them.

6 So all these choices that Epic has for distributing
7 Fortnite -- the gaming consoles, the PCs, the streaming
8 services, the Apple App Store, the Play Store, the
9 Galaxy Store, direct downloading -- those are all important
10 choices, and they show that -- and they show why Epic can't be
11 right in this case. Because when app developers, like Epic and
12 consumers, have these kind of choices, that means there's
13 competition, not monopoly.

14 The third thing that we're going to prove in this case is
15 that Epic doesn't want to pay for the benefits it receives from
16 Android and from Google Play.

17 Now, as we just saw, Epic has lots of choices and there's
18 lots of competition among those choices. What Epic really
19 wants in this case is they want to take all of the benefits of
20 Android and all the benefits of Play but not pay for them.

21 Now, in his opening and also last Thursday Epic's lawyer
22 talked about helping smaller developers and lowering the prices
23 for consumers, but the evidence is going to show you that
24 that's not what's going on here.

25 Most small developers don't pay any service fee

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1 whatsoever; and those that do pay a service fee, pay a service
2 fee that's much lower than what Epic pays. It's only the
3 largest and the most financially successful developers that pay
4 the full 30 percent fee.

5 And this isn't about lowering prices to consumers like you
6 and me for apps. Almost all the apps at the store are entirely
7 free to all of us.

8 And what you're going to see is that Epic's actions
9 actually speak much louder than the words. The evidence is
10 going to show that before this lawsuit was filed, Epic devised
11 a secret plan. They said they kept it secret. It was secret.
12 It was secret. They hid code so Google wouldn't find it, and
13 they hid that code so they could avoid paying a service fee.
14 That's not straight-up behavior. That secret plan -- and I'm
15 going to talk about it in a few minutes a little more -- that
16 shows Epic's true colors.

17 I'd like to now briefly walk you through what the evidence
18 is going to show and how it's going to prove these three
19 things.

20 Let's begin with how Android got started. So let me take
21 you back to the early 2000s. Looking at you, most of you
22 probably don't remember it; but if you had a cell phone, it
23 looked sort of something like this (indicating). You could
24 make phone calls, you could text, and that's about all you
25 could do.

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1 But there were four people at that time who had an idea,
2 and you're going to hear from a few of them during this trial.
3 One of them is Rich Miner. I put his picture up on your
4 screen. And they saw that phones were going to become
5 computers that would fit in your pocket and that you could play
6 games, you could listen to music, and you could access the
7 Internet.

8 Now, today, of course, we take it for granted that our
9 phones can do all of these amazing things; but these people saw
10 it back then, and so they started a company, these four people,
11 and they called their company Android. And Google believed in
12 their vision and so Google acquired their company in 2005, and
13 Google and Android's cofounders then spent the next three years
14 to make -- to turn Android into a reality.

15 Now, while Google was building Android, Apple launched
16 the iPhone in 2007; and with the iPhone Apple decided that
17 it was going to do everything itself. Apple makes IOS, which
18 is the operating system that runs the iPhone. It designs and
19 builds every iPhone from top to bottom. It decides what apps
20 are on the iPhone when you take it out of the box. And Apple
21 says that only its app store is where you have to go to if you
22 want to download some additional apps on your phone.

23 You'll see Google chose a different model for Android.
24 Instead of doing everything itself, Google used a model for
25 Android that was based on partnership and choice. It allowed

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1 phone manufacturers and developers and consumers to make
2 choices that Apple doesn't allow them to make on the iPhone.

3 Now I'm going to spend a few minutes now on the
4 fundamental building blocks that the cofounders in Google used
5 to create Android. Some of these building blocks are what Epic
6 says have impeded competition, but you're going to see that
7 these building blocks don't impede competition. They help
8 competition because it was the way that Android was able to
9 compete with the iPhone.

10 The first building block is the Android operating system
11 itself. As I told you last Thursday, Google made this
12 operating system an open-source operating system, and what that
13 means is that it's available for free on the Internet so that a
14 phone manufacturer can use it to make a phone. And that helped
15 bring Samsung and Motorola and 200 other phone manufacturers to
16 the table and become Android partners.

17 Now, Google's decision to partner rather than doing it all
18 itself is why you have so many choices in the Android section
19 of the store compared to the Apple section. Numerous
20 manufacturers make Android phones all with different kinds of
21 features; and because the operating system was free to all of
22 these phone manufacturers, the phone manufacturers could charge
23 a wide range of prices, lower prices. And so that meant that
24 people around the world, including those with very modest
25 means, they had access to a smartphone. And the app

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1 developers, they were able to get their apps into the hands of
2 more people.

3 But creating Android and offering the operating system
4 wasn't enough. There were other building blocks that were
5 required to make sure that Android could serve app developers
6 and consumers.

7 So the next building block is what we call compatibility.
8 What is compatibility? Well, if you have -- if you --
9 compatibility means that two phones are compatible if an app
10 that's written for one will run on the other.

11 So Google knew that developers, app developers, were not
12 going to build apps for Android if developers had to make a
13 different version of their app for each phone manufacturer.
14 And, remember, that there were 200 phone manufacturers using
15 Android.

16 And so what -- Android enabled the app developers to build
17 just one version for all of the Android phones out there, and
18 the way they did that was through what's called the
19 antifrAGMENTation agreement or AFA. And all the AFA did was
20 set up some basic standards so that Android phones would have
21 things in common so that the app developer could make just one
22 version of the app, saving time and a lot of money, and it
23 would run on Samsung phone or a Motorola phone or a Nokia phone
24 or an LG phone or any other Android phone.

25 Now, another challenge was to make sure that the Android

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1 phone provided a consistent high-quality experience as soon as
2 the consumer took it out of the box and brought it home.

3 Think about the iPhone. I'm sure some of you on the
4 jury have iPhones. So when you took it out of the box and
5 you turned it on, you found these apps already installed on the
6 phone: An app store, a browser, e-mail, maps, and so on.

7 These apps provide the core functions to a smartphone. The
8 phone can automatically do these things as soon as we turn it
9 on, and that's what we have come to expect. And Apple makes
10 sure that all of these apps are really, really good because
11 they're trying to protect the reputation of the Apple brand.

12 Now, it's a bit trickier for Android to do the same thing
13 because each phone manufacturer controls what apps are
14 preloaded on its phones. So with all these phone companies out
15 there making their own versions of Android, how do you ensure
16 that Android also stands for a consistent high-quality brand?

17 And Google addressed this with another building block
18 right from the outset. The cofounders and Google came up at
19 the outset, they addressed this with something called the
20 Mobile Application Distribution Agreement or MADA. We need to
21 be clear about what Google did and didn't do with the MADA.
22 The MADA did give Android phone manufacturers the opportunity,
23 if they chose it, to put a set of Google's core apps on its
24 phones.

25 And here are the Google core apps. You can see that they

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1 basically provide the same core functions that you find on the
2 iPhone when you take it out of the box. You have an app
3 store, you have a browser, you have e-mail, you have maps, and
4 so on.

5 Most of the Android manufacturers wanted to sign the MADA
6 because they wanted their phones to have these great apps right
7 out of the box.

8 But it's important also to remember what Google didn't do
9 with the MADA. It didn't require any manufacturer to sign a
10 MADA. If you wanted to use the Android operating system for
11 free and not sign a MADA, you were entirely free to do that.

12 And the MADA doesn't require the Play Store to be the only
13 app store on the phone. As you saw, Samsung signed a MADA and
14 Samsung put its own app store on every single one of its phones
15 right next to Play.

16 The next building block is a great app store. A great app
17 store helps both consumers and developers. It helps consumers
18 by offering a secure and reliable way to put all the apps they
19 want on their phone, and it helps developers providing a way to
20 showcase their apps to billions of Android phone users around
21 the world. And that's why since the very beginning of Android
22 back in 2008, the MADA has always provided access to the store;
23 first Android Market and then the Play Store.

24 And the last building block that helped Android succeed
25 against the iPhone was security. Security is a big part of

1 the competition between Android phones and the iPhones. It
2 was back in 2009, and it remains so today. In fact, many of
3 you have probably seen Apple's advertising campaign based on
4 security. It's going out there telling consumers that the
5 iPhone is safer than Android phones; and so to compete with
6 the iPhone, Android phones have to be safe and they have to
7 be secure.

8 And, again, it's a little bit trickier for Android because
9 of the way it works. Android offers users and app developers
10 more choices than Apple. So if you look at the screen, you can
11 see that you can download apps from the Google Play Store but
12 you can also download apps from other app stores or directly
13 from the Internet without using any app store, and that's
14 called sideloading.

15 From the start, Android gave users choices that Apple
16 doesn't. Apple doesn't allow any other app store on the
17 iPhone. Apple doesn't allow you to directly download an app
18 from a website, but Android gives you those choices.

19 But sideloading does have some risks because sideloading
20 apps from a website can bring in malware. It's not just the
21 Epic website or the Amazon website that we're talking about.
22 We're talking about the millions of websites that are out there
23 that have an app that you can sideload onto an Android phone.

24 Now, Google and Android could have taken that choice away
25 from the consumer like Apple has, but that's not how Android is

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1 structured. Android allows for choice. So instead of taking
2 away the choice of sideloading, Google left the choice to the
3 user but wanted to make sure that it was a knowing choice by
4 providing information.

5 And so Google required phone manufacturers who wanted to
6 use the Android brand to notify users about the risks of
7 sideloading, and there's nothing wrong with that. In fact,
8 you're going to see that companies that allow sideloading also
9 have messages just like Android and Google have, and that's
10 because security is really important to competition. We need
11 to protect users because it's a critical element of competition
12 between Apple and Android and it's a critical element of
13 competition between the Apple App Store and the Google Play
14 Store, and the sideloading messages that you see here are part
15 of that competition.

16 Now, Epic's lawyer told you today that it just takes too
17 many steps to sideload and so nobody does it. Well, you will
18 see in the evidence that that's an exaggeration, and you're
19 going to see the numbers. More than a billion Android users
20 have enabled sideloading on their devices. More than a
21 billion. A billion people have done it after getting notice of
22 the potential risks, and that's because Android users have a
23 real choice.

24 So these are the building blocks that Google gave Android
25 phone manufacturers so they could build phones that could

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1 compete with the iPhone: A free operating system,
2 compatibility, great apps right out of the box, a great
3 Play Store, a great app store, and security protections.

4 Now, Epic says that many of these building blocks are
5 anticompetitive, but these building blocks are pro competitive
6 because it's how Android competes against the iPhone.

7 Now, the story of competition between Google and Apple,
8 between their phones, operating systems, and their app stores
9 doesn't end there. That's just the beginning.

10 You're going to hear about how that competition has
11 continued over the years from several Google witnesses. One of
12 them is Paul Gennai. You see his picture here on the screen.
13 Paul's from Australia. He left his job in Australia and moved
14 to the United States because he wanted to work for Google. And
15 he rose quickly through the company so that by 2010 he was one
16 of the people leading the strategy for Android and Play.

17 And Paul's going to tell you that during the 10 years that
18 he worked on Android and Play, there wasn't a single day when
19 he didn't wake up in the morning and think: How am I going to
20 outdo Apple?

21 And while Paul was working on Android and Play, the vision
22 that the Android cofounders had for Android was working. Lots
23 of different manufacturers were making phones and lots of app
24 developers, big companies, small companies, and even
25 individuals were developing apps for people who were buying

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1 Android phones. Our phones were becoming more and more about
2 the apps.

3 And Apple knew that too. Some of you probably remember
4 this advertisement by Apple. It was from several years ago.
5 This is Apple's way of telling consumers the iPhone is a
6 great product because it comes with a great app store where you
7 can find the apps that you want.

8 And Paul Gennai is going to tell you that during the
9 10 years that he worked on Android and Play from 2010 to 2020,
10 he and his team worked tirelessly to improve Google's app store
11 so it was competitive with the Apple App Store, and that
12 competition hasn't stopped because app developers don't stop.
13 They are constantly coming out with new apps and new updates to
14 existing apps. So the Play Store has to work hard to get these
15 new apps and these app updates right away because that's what
16 Android phone users want.

17 Now, one of the Google employees who does this work is
18 Purnima Kochikar, and you're going to meet Purnima during this
19 trial. A big part of Purnima's job is to work with app
20 developers, and Purnima works hard to persuade app developers
21 to persuade Android and to support Play because developers have
22 choices.

23 And Purnima is going to tell you that her job is not easy
24 because while most of the apps that are in the Apple App Store
25 are also in the Play Store, many consumers want the hottest new

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1 apps. That's what they want. And some developers choose to
2 launch their new app in the Apple App Store before the
3 Play Store.

4 That's what happened with Instagram. That's what happened
5 with Clubhouse. This past year that's what happened with
6 ChatGPT and others. They all launched in the Apple App Store
7 first.

8 And Android users, they had to wait months before those
9 apps were available to them. And other new apps were never
10 made available in the Play Store or on Android. They were only
11 available on the iPhone in the Apple App Store.

12 Now, Purnima is going to tell you that's not good for
13 Android and that's not good for Play because when the newest
14 apps are only available on the iPhone where they come out
15 there first, Android phone users are disappointed. Their
16 friends who have iPhones can play the new game or use the new
17 app and they can't, and that's a good reason for them to choose
18 an iPhone the next time around.

19 And so Purnima is going to tell you that she spends a lot
20 of time and a lot of effort competing with the Apple App Store
21 for the support of app developers.

22 Now, Epic is going to ask you to believe that the Apple
23 App Store and the Play Store don't compete. They're going to
24 try to break the phone apart as if the hardware and the
25 operating system and the app store don't relate to each other.

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1 They're going to tell you, as they did today, that, well,
2 because you can't go to the Apple App Store and get an Android
3 app and you can't go to the Play Store and get an IOS app,
4 well, therefore, they don't compete; but you're going to see
5 that that view doesn't come close to explaining what really
6 happens in this market.

7 In fact, you're going to see a lot of evidence showing the
8 direct competition between Google Play and the Apple App Store,
9 and you're going to see it in Google's own internal documents.

10 Here's an example that I put up on the screen. It shows
11 that the quality of apps matters when consumers choose between
12 the iPhone and Android phones. The concern here is whether
13 the quality of Instagram and Snapchat are the same on an
14 Android phone as an iPhone. That's Google Play's
15 responsibility. That's Apple App Store's responsibility.

16 And what the internal Google document says is we've heard
17 from Gen Zers third-party apps make or break their smartphone
18 experience. And here's another example of an internal Google
19 document that says the same thing.

20 And it's not just Google that sees Google Play and the
21 Apple App Store as direct competitors. So does Apple. You're
22 going to hear directly from the person who manages the Apple
23 App Store, and he's going to tell you that the Apple App Store
24 views Google Play as one of its primary competitors.

25 And think about what competition looks like. If someone's

1 your competitor, you watch what they're doing; and if they do
2 something to improve the quality of their product or their
3 service, well, you have to decide whether you need to do
4 something to improve the quality of your product or service.
5 And if instead what they do is they lower their price for their
6 product or service, well, you have to decide whether you need
7 to lower the price for your product or service.

8 And that's exactly what you're going to see when you see
9 the evidence of what Google Play and the Apple App Store do.
10 When one of them innovates and puts in a new product or a new
11 service, the other one watches and responds, and you're going
12 to see that evidence in this trial.

13 And the same thing happens with prices. Google Play and
14 the Apple App Store watch the service fee that each other
15 charges to app developers, and that's because they're competing
16 with each other for the support of those app developers. And
17 when one of them makes a change in their service fee, the other
18 one decides whether and how to respond.

19 And this is what happened in 2016. This document here is
20 from 2016. Epic's lawyer told you that price reductions only
21 occurred after they filed the lawsuit. This is four years
22 earlier.

23 This e-mail shows that Google learned that the Apple App
24 Store was considering reducing its service fee for
25 subscriptions to 15 percent, and Google decided "We have to

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1 plan accordingly."

2 So what happened after this e-mail? Well, shortly after
3 this e-mail, Apple did reduce its service fee for subscriptions
4 to 15 percent after the first year, the 85/15 that you see
5 there; and Google Play then followed and lowered its service
6 fee as well.

7 Why is this happening? Why are they watching each other's
8 prices and responding? It's only because they're competitors,
9 and this competition has led to enormous benefits to app
10 developers and users.

11 During this trial you're going to hear from several Google
12 employees who work on the Play Store. One of them is Mrinalini
13 Loew. Mrinalini and others are going to tell you about the
14 many benefits that both consumers and app developers get from
15 the Play Store and why Google Play charges a service fee.

16 And you're going to see that Google Play has built many
17 things for the benefit of app developers and consumers. It
18 built security protections. It built efficient ways for users
19 to find the apps that they're looking for and to discover new
20 apps. It built parental controls and it built budgeting tools.
21 It built a developer console to assist app developers. And,
22 most importantly, it built a distribution system that provides
23 access to app developers to 2.5 billion consumers around the
24 world.

25 Now, all of these services cost Google money and the

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1 service fee helps to pay for all of these benefits, for all the
2 benefits of Play and for all of the benefits of Android. And
3 these -- and these benefits aren't available to developers like
4 Epic just at the moment that someone downloads their app.
5 They're available for as long as that developer remains in the
6 Play Store.

7 Now I want to be clear. Google does not charge a service
8 fee to all app developers. In fact, it doesn't charge a
9 service fee to most app developers. Instead, the way it works
10 is Google charges a service fee only when the app developer
11 makes a sale inside of its app. Like when a user uses a dating
12 app, it downloads it for free, and then later decides to
13 upgrade with a subscription; or when a user downloads a game
14 for free, and then later decides to buy some premium digital
15 good, like a special weapon. The idea here is very simple.
16 Google makes money only when the developer makes money.

17 Now, this way of doing business, giving the app away for
18 free and then offering the user an opportunity to buy some
19 premium upgrades, that's known as the freemium model, and it's
20 become very, very popular with app developers and with
21 consumers. This slide on the screen here shows just a few of
22 the apps that use the freemium model today. Social media apps,
23 dating apps, games, so on.

24 And it's not just the big apps and the big app developers
25 that benefit from Google's business model. It's also great for

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1 the app developers who are just trying to start a business
2 because they only pay Google if they succeed in getting a
3 consumer to buy something in their app. They only have to pay
4 if they have the money to pay.

5 And, in fact, pretty much every app store out there uses
6 this freemium model. Apple uses it in the Apple App Store.
7 PlayStation uses it, Nintendo, Xbox, Steam, they all use it in
8 their app stores.

9 And one of the many developers who has benefited the most
10 from this freemium model is Epic itself. You see, Epic gives
11 its game away for free, Fortnite is free, but then Epic makes
12 literally billions of dollars selling special outfits for
13 characters, special digital weapons in its games. That's how
14 Epic makes the money. The game is free. You can try it out
15 and then if you want to, you can buy something in the game.

16 And this slide shows you all of Epic's choices. As I
17 mentioned earlier, they can offer their game through the game
18 consoles -- PlayStation, Xbox, Nintendo -- through PCs, through
19 streaming services, and through the Apple App Store. And on
20 Android there are additional choices: Play, Samsung Galaxy,
21 sideloading, and they can also preload the game onto a
22 manufacturer's device with a deal there.

23 Now, Epic told you on Thursday and they told you again
24 here today that they're not seeking damages. What they really
25 want is more choices, but Epic already has lots of choices when

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1 it comes to distributing Fortnite. You can see it right here
2 on this slide.

3 And Epic also told you that they're here to help out other
4 app developers, the small app developers, but the evidence is
5 going to show that that's also not true. In fact, under
6 Google Play's service fee model -- you okay?

7 The vast majority of app developers, you can see it on the
8 left, about 97 percent of app developers don't pay any service
9 fee whatsoever ever. They don't pay at all. And for those few
10 developers who do pay a service fee -- so now we're over on the
11 right, which is just a 3 percent -- the vast majority of them
12 pay a much lower service fee than the 30 percent that applies
13 to huge game developers like Epic.

14 The service fee that applies to Epic is higher because
15 Epic is making billions of dollars selling stuff in its game.

16 And let's talk about the 90 percent of the apps that pay
17 no service fee at all, like banking apps, government agency
18 apps, news apps, weather apps, library apps. There's many,
19 many, many apps out there that are entirely free. Google Play
20 and the Apple App Store don't make any money from them.

21 So why do they offer them in the store if they make no
22 money? It's because consumers want them. Consumers don't just
23 want apps where you can buy something inside the app. They
24 want the free apps too, and that's why Google needs a business
25 model that works for all developers, not just the big game

1 developers like Epic.

2 Now, the evidence is not going to support Epic's claim
3 that it is pursuing this lawsuit to help out the small
4 developers. The small developers are already not paying
5 anything or they're paying a much smaller service fee. Epic is
6 here just trying to help Epic.

7 And here's something else that Epic didn't tell you about
8 the service fee. The 30 percent service fee that you see here
9 and that it applies to Epic in the Google Play Store, it's
10 exactly the same fee that Epic currently pays in the Nintendo
11 store, the PlayStation store, and the Microsoft Xbox store, and
12 the Steam store; and this is also the fee that Epic paid Apple
13 in the Apple App Store. All these stores charge a mega
14 developer like Epic the same 30 percent fee. It's a market
15 fee. It's not a monopoly fee.

16 Now, remember when Epic shows -- Epic's lawyer showed you
17 a slide and showed you those lower percentages for PayPal and
18 Stripe and others, like 6 percent or 8 percent? Well, think
19 about that comparison. None of those -- PayPal and Stripe,
20 they don't have an app store. They don't scan all of the apps
21 for malware. They didn't build and offer things like parental
22 controls and budgetary tools. They didn't build a developer
23 council. They didn't build a distribution system that allows
24 you to get apps at 2.5 billion people. Play service fee is for
25 much, much more than the payment processing services that you

1 get from a PayPal or Stripe.

2 By contrast, the companies that you see on the screen
3 there, they do have app stores and they do provide similar
4 services that Play provides, and they all charge 30 percent to
5 big game developers like Epic. That's the fair comparison, not
6 PayPal or Stripe.

7 Now, the Apple App Store may be Play's strongest
8 competitor but it's not Play's only competitor. This is the
9 home screen of the Samsung Galaxy Store; and as I mentioned
10 earlier, Samsung puts another app store, their app store, the
11 Galaxy Store, on every single one of their phones right next to
12 the Play Store.

13 Unlike the iPhone, Android enables phone manufacturers
14 to put more than one app store on the phone, and that's what
15 Samsung does on every one of its phones; and that means that
16 Play and Galaxy are stores that compete for consumers and that
17 compete for the app developers. Epic chose Samsung Galaxy
18 rather than Play back in 2018.

19 I now want to respond to a few of the accusations that --
20 specific accusations that you heard from Epic's lawyer. I
21 would encourage you not to make up your mind based upon a
22 little snippet that Epic's lawyer puts up on a screen out of a
23 document nor should you do that for me either. That's why we
24 have a trial.

25 You're going to get to see the entire documents by the end

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1 of the case, and you're going to be able to hear from lots of
2 witnesses -- Google employees, Epic employees, and others --
3 and they're all going to give you more than just a highlighted
4 phrase out of an e-mail.

5 So before you make up your mind, I want you to listen to
6 what the witnesses say and look at all of the documents because
7 I think you're going to see things and hear things that are
8 very different than what Epic's lawyer just told you this
9 morning.

10 I do want to address briefly a few of the specific
11 examples that he mentioned. The first one is the games
12 velocity program or Project Hug, and this program involved
13 agreements between Google Play and game developers like
14 Activision and Riot.

15 Now, Epic told you that what these deal involved were
16 bribes, that we paid game developers like Activision and Riot
17 so they wouldn't open up a competing app store. "Bribe" is a
18 pretty strong word.

19 These agreements had nothing to do with bribes. They were
20 part of Google's efforts to get the support of app developers.
21 Remember how I told you that app developers can choose where to
22 launch their new game or their new app? They can choose the
23 Apple App Store or the Play Store?

24 Well, what this program was about was Google's effort to
25 try to make sure that the Play Store was able to get the new

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1 games or the new apps at the same time as the Apple App Store
2 and other stores. They didn't ask for exclusivity. You can
3 give it to anybody you want. All they wanted was to get them
4 at the same time so that Android users and play customers
5 weren't disappointed. That's what this program was about, the
6 competition for the support of app developers.

7 You're going to hear from Purnima Kochikar and others that
8 there was no deal to -- to -- that they wouldn't open up a
9 competing app store. These are sophisticated companies. They
10 wrote a really long agreement and they signed it. Nothing in
11 that agreement says anything that prohibits Activision or Riot
12 or anyone else from opening up a competing app store.

13 And it's not just Google who's going to tell you that; so
14 is Activision and Riot. They're going to testify in this case,
15 and they're going to tell you they never agreed to anything
16 that would prohibit them from opening up a competing app store
17 if that's what they wanted to do.

18 Plaintiff's lawyer also mentioned something called
19 Project Banyan. Remember him mentioning that? And he made
20 Project -- it involved Samsung, and he made Project Banyan
21 sound really bad for competition. But here's the key: That
22 deal never happened. He's asking you to hold Google
23 responsible for something it did not do.

24 When Samsung sent Google a term sheet and talked about
25 unnecessary competition -- he showed you that -- Google

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1 abandoned the deal within weeks. And, in fact, what the
2 evidence is going to show is that Google has competed directly
3 with the Samsung Galaxy Store before, during, and after
4 Project Banyan.

5 Let's talk for a few minutes about Epic's accusation about
6 Google Chats. You're going to see a mountain of evidence in
7 this case and you're going to hear from a lot of witnesses, and
8 you're going to have to decide whether any missing Chats could
9 possibly affect what you will know from the evidence that you
10 see and hear. You'll have to decide: Is Epic using the Chats
11 to distract me from all that evidence that I do see?

12 The first thing you should know is we made a lot of
13 evidence available to them, a lot of documents: E-mails,
14 presentations, spreadsheets, memos, and these are some of the
15 most sensitive documents in the company, presentations to the
16 boards of directors, e-mails in communication with the most
17 senior executives in the company. And Google gave its
18 employees instructions about what to do with Google Chats. It
19 told employees don't use Chats to talk about topics related to
20 this case; but if you do, then turn history on so that you can
21 save the chat.

22 Now, some of the employees didn't follow that instruction,
23 and you're going to hear a couple of them in this case. Others
24 did follow that instruction.

25 And it's true that Google could have automatically saved

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1 all Chats for all of the relevant employees, but just because
2 Google didn't save some Chats, doesn't mean it violated the
3 antitrust laws. This is a case about competition and there's
4 plenty of evidence of competition. Chats or no Chats, the
5 iPhone and Android phones compete. Chats or no Chats,
6 Google Play and the Apple App Store compete. And Chats or no
7 Chats, Google competes with the Samsung Galaxy Store and
8 others.

9 So if Epic claims won't be supported by the evidence, then
10 why are we here? Well, what you're going to hear is that in
11 April 2020, Tim Sweeney came to Google and he said, "I want to
12 put Fortnite in the Play Store." And he knew the deal. He
13 would get all of the benefits of Android and Play and he would
14 pay a 30 percent service fee for in-app purchases.

15 Epic said he wanted to get Fortnite in the store right
16 away. So Google took a team of engineers and flew them to
17 North Carolina where Epic is headquartered, and they worked
18 hard and got Fortnite into the store in two weeks.

19 But unfortunately this was all a trick. It was all part
20 of a secret scheme that was devised by Mr. Sweeney himself, and
21 he called this scheme Project Liberty; but as you'll see, this
22 has nothing to do with liberty.

23 What he did was that they submitted a particular version
24 of Fortnite that had secret code hidden deep inside of it where
25 Google wouldn't find it; and then after it had Play -- after

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1 Fortnite had been on Play for a few weeks or a couple of
2 months, they then activated the secret code using a Hotfix.
3 And when the Hotfix activated the code, it enabled Epic to
4 avoid paying the service fee.

5 Now, if you think that's wrong, you're not alone. What
6 you see on the screen here are statements, internal e-mails
7 from Epic employees. They knew this was wrong. Employee after
8 employee knew this was wrong: We're just planting the
9 nefarious seed now. How do we not look like the bad guys? And
10 others that you can see on the screen.

11 Members of the jury, as this trial gets started, I'd ask
12 you to keep one thing in mind. Keep your eyes out for evidence
13 of competition: Evidence that the Google Play Store and the
14 Apple App Store view one another as competitors; evidence that
15 the Google Play Store and the Apple App Store compete against
16 each other by making improvements, by lower service fees, and
17 by offering deals to try to win over the app developers; and
18 evidence that competition between Play and the Apple App Store
19 is a critical part of the competition between Android phone and
20 the iPhone.

21 Don't let Epic distract you from these clear facts.
22 Because Google faces strong competition from Apple and others,
23 it cannot be and it is not a monopolist.

24 Thank you very much for your time.

25 **THE COURT:** Okay. We're going to take a 15-minute

1 break, and then we'll have lunch at about 12:30. Okay?

2 **THE CLERK:** All rise.

3 (Recess taken at 11:32 a.m)

4 (Proceedings resumed at 11:51 a.m)

5 (Proceedings were heard in the presence of the jury:)

6 **THE COURT:** Okay. Who do we have first?

7 **MR. EVEN:** Yonatan Even for Epic Games.

8 And Epic calls Mr. Steven Allison.

9 **THE COURT:** All right. Do you have the photograph?

10 **MR. EVEN:** Yes, Your Honor, we have the photographs
11 and witness binder.

12 **THE COURT:** Okay. Go ahead.

13 Oh, wait. You need to swear the witness in first.

14 **THE CLERK:** Please stand and raise your right hand.

15 **THE WITNESS:** Stand?

16 **THE CLERK:** Yes.

17 **STEVEN MATTHEW ALLISON,**

18 called as a witness for the Plaintiff, having been duly sworn,
19 testified as follows:

20 **THE WITNESS:** I do.

21 **THE CLERK:** Thank you.

22 Please state your full name for the Court and spell your
23 last name.

24 **THE WITNESS:** Steven Matthew Allison. My last name is
25 spelled A-L-L-I-S-O-N.

1 **THE CLERK:** Thank you.

2 **DIRECT EXAMINATION**

3 **BY MR. EVEN:**

4 **Q.** Good morning, Mr. Allison.

5 **A.** Good morning.

6 **Q.** Where do you work, Mr. Allison?

7 **A.** I work for Epic Games.

8 **Q.** And what does Epic Games do?

9 **A.** Epic Games is a game developer that makes games like
10 Fortnite, Rocket League, and Fall Guys, and we're a provider of
11 3-D engines -- or a 3-D engine called the Unreal Engine that is
12 used in game development and many other industries; and we're
13 also a creator of an ecosystem of marketplaces where the Epic
14 Game Store resides.

15 **Q.** And what is your role at Epic?

16 **A.** I am the vice president and general manager of the Epic
17 Game Store.

18 **Q.** When did you join Epic?

19 **A.** In may of 2018.

20 **Q.** How long have you been working in the video game industry
21 overall?

22 **A.** Close to 30 years.

23 **Q.** Can you please walk us briefly through your career prior
24 to joining Epic?

25 **A.** Sure. Okay. I started in 1994 at a company called Atari.

1 We -- that was right out of college, and I stayed at Atari for
2 about 10 years in a variety of roles. I left in 2003 as the
3 vice president of business development in marketing, which is
4 the role I held for the majority of my time.

5 I left Atari in 2003 and joined Midway Games as the chief
6 marketing officer and senior vice president. I stayed until
7 2008.

8 In 2010 I joined a company called Telltale Games, an
9 independent developer of narrative video games, and as the
10 senior vice president of publishing where I was in charge of
11 all revenue, all partnerships, and all distribution.

12 **Q.** In May 2018 when you joined Epic, did you join Epic for
13 any specific purpose?

14 **A.** To start the Epic Game Store.

15 **Q.** And when was the Epic Game Store launched?

16 **A.** In December of 2018.

17 **Q.** What platforms was the store launched on?

18 **A.** For PC and Mac.

19 **Q.** And does Epic want to launch its store on Android?

20 **A.** We do.

21 **Q.** What is it about Android that makes it appealing for a
22 store like the Epic Game Store?

23 **A.** It's got a massive user base of billions, and so there's
24 just an addressable market opportunity there that's interesting
25 for us.

1 Q. Let's talk a little bit about the history of the Epic Game
2 Store.

3 When did you first become aware that Epic was considering
4 opening its own game store on PCs?

5 A. In 2016 I was engaged in a conversation with the
6 leadership at Epic to join the company potentially as the head
7 of publishing; but while I was on that visit, we also talked
8 about what is today the Epic Game Store, which is the idea that
9 Epic wanted to provide an alternative to other marketplaces
10 that was focused on maximizing developers' financial success.

11 Q. At the time how was Epic distributing its own games on
12 PCs?

13 A. Direct to players.

14 Q. And was Epic using something called a launcher?

15 A. Yes.

16 Q. What is the Epic Games launcher?

17 A. A launcher is an application that you download from the
18 web. When you sell -- when you direct distribute a PC game,
19 you generally need some sort of application in which to run it
20 to make it available to players; to update it; if you have any
21 financial transactions to make within that game, you need to be
22 wired up for that; and in some cases it provides friends and
23 social functions as well.

24 Q. What was your view back in 2016 about whether Epic was
25 ready to open its own store?

1 **A.** I loved the conversation and I thought the idea was super
2 fascinating, but I didn't think Epic was ready to pursue it at
3 the time.

4 **Q.** And why was Epic not ready, in your view, back in 2016?

5 **A.** I had personally held a belief that to start a store in
6 gaming that would compete with some of the other stores that
7 had entrenched positions, that you needed to have what I was
8 calling at the time an anchor, a very strong piece of content
9 that would -- the ecosystem would build itself around. And
10 Epic had not launched Fortnite yet. It was actually running a
11 game called Paragon that was doing well but wasn't well enough
12 to do a store ecosystem around.

13 **Q.** And you told us already that you joined in 2018 to open a
14 store. So what changed between 2016 and 2018 that changed your
15 view about Epic's preparedness to open its own store?

16 **A.** Fortnite came out in 2017.

17 **Q.** Did you tell anyone at Epic that your views changed after
18 Fortnite came out?

19 **A.** I did.

20 **Q.** So if you turn, please, in your binder, you should have
21 something marked Exhibit 5519.

22 And do you recognize this document?

23 **A.** I recognize the original e-mail at the bottom, yes.

24 **Q.** And what is that e-mail?

25 **A.** That's an e-mail that I sent in -- on March 23rd of 2018

1 to Paul Meghan, who was at the time the president of
2 Epic Games.

3 **MR. EVEN:** Your Honor, at this time Epic would like to
4 move into evidence Exhibit 5519.

5 **THE COURT:** Any objection?

6 **MR. MACH:** No, Your Honor.

7 **THE COURT:** All right. It's admitted.

8 (Trial Exhibit 5519 received in evidence.)

9 **MR. EVEN:** Okay. Let's please publish it to the jury.
10 Thank you.

11 **BY MR. EVEN:**

12 **Q.** I'd like to start on the very first paragraph, and you can
13 follow me on paper or on the screen, whichever is more
14 convenient for you, Mr. Allison.

15 **A.** Yep.

16 **Q.** Towards the end of the first sentence you wrote to
17 Mr. Meghan about how Fortnite is blowing up pop culture. What
18 did you mean by that?

19 **A.** So I've been in the games business for not 30 years at
20 this point but about 25 and had seen a lot over time, and I had
21 never seen a game impact -- some people call it the zeitgeist
22 or the excitement around the game was at a level that was
23 bigger than anything, movies, television, any game I'd ever
24 seen, like nothing that our industry had ever seen. So I was
25 really excited by Epic's success. I've known Epic for a long

1 time across my journey and was super happy to see Fortnite
2 really change the game.

3 **Q.** Let's go to the third paragraph where you're saying in the
4 first sentence, if you can highlight that (as read):

5 "I'm dropping you this note completely out of the
6 blue on the topic of your plans for the Epic Games
7 launcher."

8 Do you see that?

9 **A.** I do.

10 **Q.** And what plans were the Epic Games launcher are you
11 referring to here?

12 **A.** My intent in saying that was to call back to the
13 conversation we had when I visited a couple years earlier about
14 wanting to create a third-party game store focused on
15 developers' success.

16 **Q.** And what's the relationship between the launcher and a
17 store?

18 **A.** If you built a store, the store would live in the
19 launcher.

20 **Q.** If you go to the third sentence in the same paragraph, you
21 see that it says (as read):

22 "Fortnite blowing up definitely has created that
23 potential Valve Counter-Strike moment at a scale that is
24 much bigger than when that gave birth to what is now
25 Steam."

1 Do you see that sentence?

2 **A.** I do.

3 **Q.** So it's a complicated sentence, so I'd like to unpack it a
4 little bit if we may.

5 **A.** It is.

6 **Q.** First of all, what is Steam?

7 **A.** Steam is a third-party store for PC and Mac gaming that is
8 right now the dominant store that we compete with on PC and
9 Mac.

10 **Q.** And so it's like an app store for games but on PC?

11 **A.** Correct.

12 **Q.** And when was Steam launched?

13 **A.** Around 2003.

14 **Q.** And what is the Valve Counter-Strike moment that led to
15 the birth of Steam in 2003 that you're talking about?

16 **A.** Okay, I'll try to do this simply.

17 So when I talked about Epic -- a feeling that Epic wasn't
18 ready, we had this specific conversation I'm going to take you
19 through.

20 Counter-Strike in 2003 was a game -- so Valve is a
21 developer of video games, and Valve created a game called
22 Counter-Strike among several others. And in 2000 -- basically
23 from 2002 on, Counter-Strike impacted our industry much in the
24 way that Fortnite did but maybe a little bit of a smaller
25 scale. It was one of the biggest games on the market. People

1 were super stoked about it. It was changing gaming, and they
2 were publishing it direct to players because they were starting
3 to discover that they needed to do so in order to run what was
4 becoming one of the first live service games.

5 So they built a launcher to house it and created the
6 launcher in order to update the game on a regular basis in
7 order to have an account system where people could have friends
8 so that they could talk to their friends and figure out how to
9 play each other, kind of schedule those things, among other
10 things. It was really redefining what multiplayer social
11 gaming was all about and was something that we hadn't seen
12 maybe ever at that point.

13 **Q.** And how does that success of Valve distributing
14 Counter-Strike lead to the birth of Steam?

15 **A.** It started a lot like how Fortnite -- where Fortnite was
16 at this point in time. It was just Counter-Strike. At the
17 same time during this period in our industry we were
18 experiencing what some people were calling the death of PC
19 gaming, and I'll explain that.

20 So PC gaming prior to some other gaming companies like
21 Valve doing this direct-to-player digital distribution were
22 primarily distributed in stores. Like Walmart was one of the
23 biggest places you could in America. There were stores, if you
24 remember, like Egghead Software or Electronics Boutique and
25 there was a huge business selling PC games in big boxes and

1 discs and not a big business in doing downloads at this point
2 in time yet.

3 Physical retail was starting to pull out of that business
4 in the early 2000s, and there was a lot of narrative and lots
5 of companies, including my own, were pulling out of doing PC
6 gaming at all.

7 So this was creating a situation where a lot of developers
8 were becoming very desperate to find solutions. They didn't
9 think PC gaming was dead. They were building games for
10 players. They were finding it hard to find funding from
11 publishers, finding it hard to get distribution in physical
12 retail, and could point to examples like: Well,
13 Counter-Strike's huge. Like, how come -- like, how do we --
14 how do we solve this problem?

15 Valve decided in about the middle of 2004 to lean into
16 what was happening and offer other developers the opportunity
17 to join their launcher in what would ultimately become a big PC
18 market, but it was started very conservatively with, like,
19 three or four games in the first year.

20 **Q.** And what was the name of that PC market that Valve opened?

21 **A.** It was called Steam. The launcher was called Steam in
22 2003 when they -- when they launched it just for
23 Counter-Strike, so it was: Basically come join us on Steam,
24 and we'll help you get distribution because we have millions of
25 Players.

1 Q. All right. Let's try and come full circle on that.

2 What did you mean when you said that Fortnite blowing out
3 created the Valve Counter-Strike moment?

4 A. So Fortnite was bigger than anything I'd ever seen and
5 Paragon was not Counter-Strike or Fortnite. So when we were
6 talking about doing the Epic Game Store, we talked about all
7 the stuff, the specific example.

8 Fortnite being what it was, I didn't have all the numbers
9 but I could observe it from just being in the industry for a
10 long time, I firmly believed it was bigger than anything I'd
11 ever seen and so I felt like it was a good opportunity to reach
12 out to Paul and say "If you guys are still thinking about this
13 stuff, boy, do you really have, you know, that seed, that
14 anchor for a future store that Counter-Strike ended up being
15 for Steam."

16 Q. Let's go to the next sentence in the same paragraph, and
17 you see that you talk about "Let's take it slow."

18 So it's, first of all, it says (as read):

19 "Valve is taking 30 percent."

20 Do you see that?

21 A. Yes.

22 Q. What is the 30 percent you're referring to here?

23 A. That's me referencing their rev share.

24 Q. And what do you mean by "rev share"?

25 A. Rev share on Steam at the time was what we call -- I mean,

1 it's a 70/30 split, so 70 percent to the seller and 30 percent
2 to Valve or Steam.

3 Q. So let's say if Steam sold a game for \$10 for some
4 developer, how much did Steam get to keep?

5 A. \$3.

6 Q. When did Steam first introduce this 30 percent fee?

7 A. When they started back in 2004 when they invited the first
8 developers to join Steam, it was under the 70/30 split
9 structure.

10 Q. Do you understand where that 70/30 split structure came
11 from?

12 A. I do.

13 Q. Where from?

14 A. Having worked pretty extensively with Valve and my time at
15 Telltale and talking about these things, they were basically at
16 a high level mimicking what is the relationship between a
17 seller and a publisher at physical retail, but the structure
18 is -- it's a bit complicated to explain.

19 But basically the way physical retail worked was under a
20 wholesaler/reseller model. So developers, publishers, would
21 offer a game at physical retail for a wholesale price and then
22 the retailer would take the game and mark it up 30 percent.

23 So when you would do -- do all -- put all that together,
24 the seller of the first part was getting 70 percent and then
25 the retailer was seeking to mark the game up by 30 percent and

1 sell it to players.

2 **Q.** I see.

3 So Steam was keeping the same sort of rev share that
4 Walmart was keeping when it sold a disc, in other words?

5 **A.** As a high-level idea, yes, but the cost structure
6 underneath the whole process of physical distribution is much,
7 much different than digital.

8 **Q.** Got it.

9 At the time when you were writing this e-mail to Epic,
10 what was your view of the 30 percent fee that Steam was
11 collecting?

12 **A.** That it was quite high.

13 **Q.** And why did you believe that Steam's 30 percent share was
14 quite high if it simply replicated what a Walmart or a GameStop
15 would charge in retail?

16 **A.** So we talked about my job before Epic was at a company
17 called Telltale Games. We were a pretty successful developer
18 of games, and we published games and distributed games on all
19 platforms: Console, mobile, and PC. We also had our own
20 storefront. So we built a storefront to sell direct to
21 players. We didn't use a launcher in the same way that Epic
22 did, but we built a store where we could direct to players and
23 take payments and do all the things you need to do to run a
24 storefront.

25 We made -- besides the money we made on PC from Valve, we

1 made the most money from our storefront, and we were basically
2 taking about 95 percent of every dollar by building the store
3 ourselves and facilitating the payments and all the things you
4 need to do to sell direct to players.

5 **Q.** Let's go back to your e-mail.

6 You then say (as read):

7 "Valve is taking 30 percent of 85 to 95 percent of
8 the paid games PC market."

9 What is the 85 to 95 percent you're alluding to here?

10 **A.** So there's a -- you can look at the PC market through a
11 couple different lenses. So that's, to me, like smashing it
12 all together and -- because I tend to write this way. I'm
13 sorry.

14 But if you looked at the whole PC market, which is games
15 sold direct to players or games sold on third-party stores,
16 Valve had 80 to 85 percent of that market. If you look at the
17 distribution of PC games and third-party stores only, so you
18 take out companies like Epic who were selling direct to players
19 or Riot games who were selling their games direct to players,
20 they actually owned about 90 to 95 percent of the PC market.

21 **Q.** You mentioned that there were some developers -- there was
22 some delta there -- so some developers went outside of Steam it
23 sounds like. Can you mention a few of the developers that did
24 that over time?

25 **A.** Sure. Well, Epic Games was one of them. There's a

1 company named Mojang that makes Minecraft. They never offered
2 their game for sale on Steam and have always done their PC
3 sales direct. There's a company called Riot Games that makes
4 League of Legends and currently a game called Valorant that's
5 incredibly successful and sells direct to players very much in
6 a launcher structure like Epic Games.

7 There's -- there's -- that's -- those are top three good
8 examples, but there's many, many others as well.

9 **Q.** And how could these top three developers, like Riot that
10 you mentioned or Mojang, how could they open up their own store
11 and forego the millions of users who came to the store, to
12 Steam?

13 **A.** Anyone could do it, but to have the success that they had,
14 they also had games of significant scale and size and big
15 communities, and so they were able to address those communities
16 very effectively. They had excitement for their products, and
17 they could just direct them to their own storefront or launcher
18 solution.

19 **Q.** So let's go back to the last bit of that sentence.

20 You say Steam is doing -- they do a great job and fairly
21 effortlessly are bringing in four-plus billion dollars a year.

22 What did you mean by that?

23 **A.** At that time in 2018 that was approximately the revenue
24 that they were bringing in from Steam. And "fairly
25 effortlessly" is my reference to how we felt about it, at least

1 at Telltale from our leadership team and from many other
2 developers that we worked with and spoke to often.

3 Basically Valve at that point was very big. They had
4 hundreds of thousands of titles. They had a very automated
5 system. Getting any interaction with them was incredibly
6 difficult. So we all -- those of us who felt that way -- I
7 can't say all -- felt that very passively without much
8 interaction with us as developers were taking 30 percent of our
9 business without really helping us out beyond the fact that
10 they offered -- they did offer a great storefront and they
11 continue to do that, but the interaction and the effort to do
12 so was, in our opinion, very passive.

13 **Q.** Let's take a look at the fifth paragraph at the bottom of
14 the page, and you start by saying (as read):

15 "Steam is pretty ripe for disruption."

16 What did you mean by that?

17 **A.** Basically what I just talked about and the feelings that
18 some leadership teams and developers had in the market, we
19 were -- we were excited by any viable alternative to Steam even
20 if it just expanded our footprint and gave us the opportunity
21 to have a different revenue mix.

22 **Q.** And if you go to the last sentence in that paragraph,
23 which starts at the very bottom of this page, it says (as
24 read):

25 "With the launcher in as many hands as it is now, it

1 can quickly evolve into a real challenger in the PC
2 market."

3 Do you see that?

4 **A.** I do.

5 **Q.** And what did you mean that you can quickly launch into a
6 real challenger?

7 **A.** I had some knowledge that the PC accounts that Epic had
8 were close to 100 million and that the monthly active users who
9 played the game every month was quite high. If those numbers
10 were correct, it was higher than Counter-Strike ever was when
11 Valve started Steam, and I felt like this would be -- like, an
12 incredible anchor to build a storefront around.

13 **Q.** And then if we go to the next sentence, you say (as read):

14 "A model that was 80/20 for all games and maybe 90/10
15 or 95/5 for Unreal Engine-based games, paired with the
16 scale you've just hit would immediately disrupt the entire
17 industry."

18 What did you mean by a model "that was 80/20 for all
19 games"?

20 **A.** A big part of the conversation we had when I was at Epic
21 in that 2016 visit was about if we did a store, it would be all
22 about, like, providing a scaled environment where developers
23 could make more on every dollar sold; and so we just talked
24 about different rev share ideas, and there were a bunch of
25 them. People had lots of thoughts. And this was just calling

1 back to that conversation.

2 Q. What happened after you sent this e-mail to Epic?

3 A. I had a -- I had a call with Paul, who is the person I
4 wrote the e-mail to, about a week later and flew out to Epic
5 maybe two-ish weeks later; and over the next four weeks, we
6 worked out an offer, and I joined the company in May.

7 Q. Did Epic offer an 80/20 split to all gamers -- to all
8 developers?

9 A. When we launched the store or --

10 Q. Yes.

11 A. No. We -- we offered a different rev share in the end.

12 Q. What commission structure did Epic eventually decide on
13 for its store?

14 A. 88 percent to the developer and Epic takes 12 percent.

15 Q. How did Epic decide on 12 percent?

16 A. We had a lot of conversation over a number of months
17 starting with something very similar to that sentence we just
18 looked at.

19 Basically when it came down to it, in the end, what we
20 were looking to try to do was help all developers have the
21 opportunity to make as close as possible to those economics
22 that a publisher like Epic or Riot or Mojang made selling their
23 games direct to players in their solutions, which is, to just
24 sort of recap, close to 95 percent and then 5 percent of
25 marginal costs. It's a little bit different depending on how

1 you set yourself up, but generally that's the range. So we
2 were trying to provide self-publishing economics to everyone on
3 this storefront.

4 **Q.** Now, the Epic Game Store has now been open nearly
5 five years; right?

6 **A.** That's correct.

7 **Q.** And in your view, is the 12 percent revenue share that
8 Epic landed on sustainable?

9 **A.** Yes.

10 **Q.** And is the Epic Game Store still in sowing mode or is it
11 now reaping already?

12 **A.** We're still sowing. We're in investment mode for growth,
13 yeah.

14 **Q.** Are you still not profitable?

15 **A.** We are not profitable. We're investing in scaling the
16 store and continuing to do so because it's been very effective
17 so far.

18 **Q.** You say you invest in growth. How has the store grown
19 since its launch?

20 **A.** When the store opened in December of 2018, I think
21 Fortnite's monthly active users, so the number of users that
22 came to the launcher every month, was around 16 million. Today
23 our monthly active users average around 65 million. So about
24 five times where we were in 2018.

25 **Q.** And how many games does the Epic Game Store now offer?

1 **A.** Close to 3,000.

2 **Q.** How many games did the Epic store have when you started?

3 **A.** Fortnite plus three -- four.

4 **Q.** Does the store impact the success of Epic's own games in
5 any way?

6 **A.** We believe so, yes.

7 **Q.** How so?

8 **A.** So an ecosystem of products in a store environment
9 creates, I don't know, like "a rising tides lifts all boats"
10 kind of dynamic. So think about Fortnite as a game that is
11 just in a launcher by itself. So that launcher, there's one
12 game, that's the application you use to access the game; but in
13 life, anyone who plays games, plays other games. They don't
14 just play Fortnite. They'll -- other games come out, other
15 things happen in life, like school or whatever.

16 And so when a player stops playing a live service game,
17 Fortnite, Riot's games, any game, frankly, we call it churn.
18 So when a player churns, they leave that application, and
19 getting that player to come back to an application for just one
20 product is a lot harder than if you're in an ecosystem of a
21 store that has thousands of titles that if you're churning out
22 of Fortnite but you see something interesting that you might
23 want to buy in that ecosystem, you're still in the ecosystem.

24 And when you see the storefront and the marketing for new
25 game releases or updates to Fortnite, there's an ethical way to

1 keep those players close; and if that marketing or that
2 merchandising captures their excitement and gets them back into
3 the game, it's a much better, healthier way to keep, you know,
4 churn down.

5 Q. So I want to move to a slightly different topic and talk
6 to you a little bit about payments.

7 A. Sure.

8 Q. So what technology does Epic use to handle the payments on
9 the Epic Game Store itself?

10 A. We built a payment solution that we call internally Epic
11 Direct Pay.

12 Q. And you say "we built." Was it built together with the
13 store?

14 A. It was built before the store.

15 Q. And why was it built before the store? For what?

16 A. I believe it was built to help Paragon in the launcher,
17 but I'm not sure. It was definitely there when Paragon was
18 live.

19 Q. And within Paragon, what was the Epic Direct Pay
20 technology used for?

21 A. In-app purchases.

22 Q. And what are in-app purchases?

23 A. It depends from game to game, but a lot of games today
24 offer in-app purchases, which are additive content that can be
25 cosmetics, like in Fortnite, the skins. They can be special

1 promotions or events like a season pass. They could be things
2 we call consumables, which might enhance your gameplay, and it
3 could be for add-on content. It could be for anything that you
4 would transact from within that game application.

5 **Q.** Do other games or other developers that sell games through
6 the Epic Game Store also offer in-app purchases?

7 **A.** Yes.

8 **Q.** And what payment solution may these third-party developers
9 use to handle in-app purchases within their own games?

10 **A.** They have the option to use our payment solution, Epic
11 Direct Pay, or they can bring their own if they've set their
12 game up to do so.

13 **Q.** And what is -- what does Epic charge developers in
14 connection with handling in-app purchases?

15 **A.** Is that through Epic Direct Pay or --

16 **Q.** Well, let's start with through Epic Direct Pay. What does
17 Epic charge?

18 **A.** 12 percent.

19 **Q.** And what does Epic charge if the developer chose another
20 payment solution?

21 **A.** Zero.

22 **Q.** Which payment solution do developers on the Epic Game
23 Store typically choose to use?

24 **A.** Typically it's Epic Direct Pay.

25 **Q.** And does the Epic Game Store distribute any games that are

1 free to download -- freemium, what the jury has heard about
2 this morning -- and then offer in-app purchases?

3 **A.** We do.

4 **Q.** And how does Epic Game Store monetize freemium games if
5 the developer chooses to use another payment system other than
6 Epic Direct Pay?

7 **A.** We don't.

8 **Q.** Do you think it's unfair to Epic when a developer chooses
9 to make its application or game free on the Epic Game Store yet
10 Epic does not receive any payment?

11 **A.** No.

12 **Q.** Why not?

13 **A.** Well, the revenue is one thing, but we are running by
14 design a low-margin business on the third-party side. What is
15 really beneficial to everybody in the ecosystem, including
16 Epic, is traffic. So games of scale who come and bring their
17 own payment solution are bringing pretty substantial monthly
18 active users and traffic that helps every developer in our
19 ecosystem, including Epic.

20 **Q.** Now, you mentioned that developers have a choice. Has
21 Epic always allowed developers this choice between using Epic
22 Direct Pay or another payment platform for their in-app
23 purchases?

24 **A.** Not at first, we did not.

25 **Q.** And why did Epic decide to change its policy on this?

1 **A.** We ran really fast and hard at launching the store, first
2 of all, and we didn't really think about -- we knew we had --
3 like we said, we had four games that launched. The three other
4 games were paid games. We just -- it just wasn't something we
5 focused on.

6 But as we got out of launch and into January of 2019, we
7 had struck a partnership with a company called Ubisoft, who's a
8 major publisher who was in the process of leaving Steam at the
9 same time that we launched, and we struck an exclusive
10 long-term relationship with them.

11 They have a number of games that are built around in-app
12 purchase, and they have already -- they have their own
13 storefront, and they are already built to -- they're wired up
14 to that payment solution.

15 Ubisoft was asking us to consider letting them use their
16 payment solution versus the engineering re-architecture that
17 that would take, which can be substantial. It depends on your
18 game. They were asking.

19 We had another exclusive partner in Wizards of the Coast
20 who made a game called Magic the Gathering Arena, who was in
21 beta prior to doing a strategic partnership with us, and they
22 already built their payment solution, so they were asking us to
23 consider that as well.

24 I was personally focused on getting some big potential
25 tenants that weren't on Steam, like Riot Games, and so we were

1 talking to Riot Games pretty much all throughout the year and
2 they were super excited with what we were doing and the success
3 of Epic; but their assertion was, "You know, we'll never come
4 to a storefront if we have to wire into their payments; but if
5 you would let us use our own payments, we'd be happy to join
6 you guys."

7 And so these three conversations started. They ran over a
8 number of months for sure, but they started really in January
9 with Ubisoft and led us through probably the first seven, eight
10 months of the year.

11 **Q.** And so is it the case today that only Ubisoft and Riot are
12 allowed to use their own payment solution?

13 **A.** No. We -- just as a matter of how I like to lead but also
14 how Epic's principles are, if we make a decision for a pretty
15 important policy, we're going to make that policy apply to
16 everybody.

17 **Q.** You talked about the better revenue, the 88/12 that you
18 offered developers. Did Epic use any other strategies to grow
19 the store?

20 **A.** We did, yeah.

21 **Q.** Can you mention which strategies are those?

22 **A.** Sure. Okay. This will be an explanation.

23 So there are -- there are really -- like, building the
24 store, as I've learned over these years, has got a bit of yin
25 and yang. So on one side you have players, and you have to --

1 there is no store without players, and we had a ton of players
2 that start with Fortnite because we had 15 million active users
3 but they were Fortnite players.

4 **THE COURT:** Okay. You need to slow down because --

5 **THE WITNESS:** Sorry.

6 **THE COURT:** -- we have a court reporter.

7 Also can you --

8 **THE WITNESS:** I'm a fast talker.

9 **THE COURT:** You're also going on a bit. Can you just
10 keep it -- just --

11 **THE WITNESS:** Yeah.

12 **THE COURT:** Yeah, okay.

13 **THE WITNESS:** So we had two programs. We had one
14 called Free Games program that was designed to add players
15 quickly, and we were mimicking programs that were very
16 successfully used in consoles for PlayStation, Xbox for a
17 decade prior to us doing it, and no one had ever done it on PC.
18 The program proved to be very successful. It helped us scale
19 up players very quickly.

20 The other side of that coin was if you have a ton of
21 player growth, you need to have content for them to buy that
22 matters; and so it was really important for us to get important
23 games and strategic partnerships that players would be excited
24 about exclusively for a timed exclusive period.

25 **Q.** So let's talk about the free games program first.

1 How often does Epic Game Store offer free games to users?

2 **A.** Currently we do it every week.

3 **Q.** And how many games have you offered over the years?

4 **A.** Over 300 for sure.

5 **Q.** And you consider that program to be a success?

6 **A.** I consider it to be a home run success, yes.

7 **Q.** Turning to the exclusive partnerships that you talked
8 about with developers, you said that Epic was very -- Epic Game
9 Store was very small, Steam was very big.

10 How does an Epic Game Store convince a major developer to
11 bring its game exclusively to the store and forego distribution
12 on Steam?

13 **A.** We had a good confluence of events. The launch of
14 Fortnite was fascinating to almost everybody in the industry,
15 so we had that on our side, and that had an interesting player
16 base for sure.

17 We had this sentiment among some developers that Steam was
18 very passively taking 30 percent of their business, and they
19 wished for some other alternative, either to add to their mix
20 or as a real alternative that would charge a different rate and
21 give them more interaction in their business.

22 And so that was easy to address, and we had -- when we
23 pitched the Epic Game Store to people, we had really great
24 responses. And we tested that out early in the summer and
25 pretty much had 100 percent response like "We want to join you

1 guys."

2 We believed -- I certainly believed that in order to build
3 the business and get our players spending money, we needed to
4 have some content you couldn't get anywhere else just like you
5 couldn't get Fortnite anywhere else.

6 And so like the free game program, consoles have used
7 timed exclusives as a business strategy to grow their platforms
8 as well for decades, and we had never seen that in PC. So we
9 also decided to pursue a very similar strategy.

10 **Q.** And what is it that you promised developers in exchange
11 for bringing their games exclusively to Epic?

12 **A.** We structured the deals very similarly to how the console
13 deals would work, which was to guarantee that during the
14 exclusive period of time, if you left Steam and you came to the
15 Epic Game Store, we would guarantee you that you would make the
16 revenue that you were expected to make on Steam if you chose to
17 bring your game exclusively to the store for a timed exclusive.

18 **Q.** How many exclusive deals with the minimum guarantee has
19 the Epic Game Store entered over time?

20 **A.** About 180 in our five years.

21 **Q.** And how many of those did you enter into the first year?

22 **A.** 120 or so.

23 **Q.** How many exclusive minimum guarantee deals do you expect
24 to have this year?

25 **A.** Two.

1 Q. And why has the number declined so rapidly?

2 A. The audience size has grown from 15 million to 65 million.
3 Our partners have started bringing games at scale. We've also
4 launched the ability for publishers to self-publish their
5 games, and we're seeing a ton of great adoption and people are
6 publishing hundreds of games every month.

7 We really considered that a first- or second-year business
8 strategy and that we would start to reduce the volume of those
9 deals to really just primarily focus on strategic partnerships.
10 We still do them and we still will do them, but we don't need
11 to do them at the scale that we needed to in our first couple
12 of years.

13 Q. Setting aside the minimum guarantee deals, has Epic -- now
14 that it does less of them, has Epic introduced any other
15 program for exclusivity?

16 A. We have.

17 Q. What is that?

18 A. We have a program called Epic First Run. It is an opt-in
19 exclusive program. So a developer can decide to be exclusive
20 to the Epic Game Store, and the timed exclusive period is six
21 months; and if a developer chooses to do that, they get
22 100 percent of the revenue for the first six months of the
23 title basically while the title is exclusive on Epic Game
24 Store.

25 THE COURT: Okay. We'll take our lunch break and

1 we'll resume at 1:00 o'clock.

2 **THE CLERK:** All rise.

3 (Luncheon recess was taken at 12:30 p.m.)

4 **AFTERNOON SESSION**

1:09 p.m.

5 (Proceedings were heard out of the presence of the jury:)

6 **THE COURT:** Okay. Bring in the jury, please.

7 (Proceedings were heard in the presence of the jury:)

8 **THE CLERK:** We're back on the record in Civil 25- 671,
9 Epic Games, Inc. vs. Google LLC, and Multidistrict Litigation
10 21-2981, In re Google Play Store Antitrust Litigation.

11 **THE COURT:** Okay. Go ahead.

12 **MR. EVEN:** Thank you, Your Honor.

13 **BY MR. EVEN:**

14 **Q.** Mr. Allison, we were talking about exclusivity deals. Are
15 you ready to continue?

16 **A.** Yes.

17 **Q.** Would the exclusivity agreements you entered or enter into
18 prevent a developer from launching their game on any platform
19 other than PCs and Mac computers?

20 **A.** No.

21 **Q.** And has Epic been public about the fact that it entered
22 into exclusivity deals with developers?

23 **A.** Yes.

24 **Q.** Do you consider Epic's exclusive content program to be a
25 success?

1 **A.** I do.

2 **Q.** In what way?

3 **A.** It's helped us get the content that we needed from third
4 parties that players were going to pay for and be excited
5 about.

6 **Q.** If Steam had agreements in place with developers that
7 prevented them from entering into exclusivity agreements with
8 the Epic Game Store, how do you think that would have affected
9 your ability to grow?

10 **A.** Depending on the titles that those deals were for, we may
11 not have gotten some of the key titles that were really
12 important for our first couple of years.

13 **Q.** So I want to talk a little bit about what happened in the
14 PC market after the Epic Game Store launched.

15 So you mentioned that the biggest store was Steam. Has
16 Steam reacted in any way to the launch of the Epic Game Store?

17 **A.** They have.

18 **Q.** How so?

19 **A.** About a week or week and a half before we launched the
20 store in December of 2018, Valve announced a rev share change
21 from the 70/30 that they had run from all the years prior to a
22 tiered structure that had three tiers starting at 30 percent
23 and ending at 20 percent depending on the sales level of your
24 games.

25 **Q.** Did you see any reaction from any of the other stores on

1 PC?

2 **A.** We did.

3 **Q.** Which ones?

4 **A.** There's a company called Discord that makes a fairly
5 substantial communication app that had launched a PC store in
6 October of 2018, and that store had a 70/30 split when it
7 launched. About two weeks after we launched the Epic Game
8 Store, they changed the rev share from 70/30 to 90/10.

9 **Q.** Any other stores?

10 **A.** The Microsoft -- the Windows store in about March of 2019
11 changed their rev share from a 70/30 standard to 85/15 and then
12 again revised their rev share around April of 2021 to match the
13 Epic Game Store's 88/12.

14 **Q.** So in the PC space is 70/30 still the standard?

15 **A.** No.

16 **Q.** You mentioned that the Epic Game Store is obviously
17 available on PCs. As a general matter, how does a user obtain
18 the Epic Game Store on their PC?

19 **A.** You go to Epic Games' website and you download the
20 launcher.

21 **Q.** And what about Steam? How does the user get Steam?

22 **A.** You go to Steam's website and download their launcher.

23 **Q.** Before a PC user downloads the Epic Game Store or Steam,
24 what changes, if any, do they need to make to their settings on
25 their computer?

1 **A.** None.

2 **Q.** Before a user obtains downloads from the Steam store or
3 the Epic Game Store, what kind of warnings do they see?

4 **A.** They don't typically get any.

5 **Q.** You said earlier that Epic wants to be on Android. Has
6 Epic ever looked into the possibility of opening the Epic Game
7 Store on Android?

8 **A.** We have.

9 **Q.** So why has the store never launched on Android?

10 **A.** We launched Fortnite in 2018 through direct download on
11 the Android platforms, and the numbers were disappointing
12 overall. We -- an assessment of why they were disappointing
13 relative to other platforms, it was based on interaction with
14 the community and a lot of discussion with leadership
15 internally that all the warnings that come from the Android
16 platform when you do a direct download were off putting and
17 creating friction for user.

18 **MR. MACH:** I'm sorry. Objection, Your Honor. It's
19 hearsay. He's speaking to conversations with others outside of
20 his company.

21 **THE COURT:** Overruled.

22 You can go ahead.

23 **MR. MACH:** Thank you, Your Honor.

24 **BY MR. EVEN:**

25 **Q.** And in that context was -- you mentioned that on PC

1 Fortnite launched or was downloaded through a launcher. Do you
2 remember that?

3 **A.** Yes.

4 **Q.** Was Fortnite on Android through what Google refers to as
5 sideloading, was that involving the download of a launcher?

6 **A.** A form of a launcher, yes.

7 **Q.** And why do you think that Epic's lack of success with
8 getting the launcher download for Fortnite suggests that Epic
9 could not successfully launch the Epic Game Store for -- on
10 Android?

11 **A.** For me personally, the anchor game, the anchor experience
12 that we needed like we have on PC and Fortnite wasn't scaled
13 enough in the numbers we were getting.

14 **Q.** Instead of trying to get the store or the launcher through
15 another -- through sideloading, could the Epic Game Store
16 simply launch on Google Play?

17 **A.** Not today.

18 **Q.** Why not?

19 **A.** Their policies.

20 **Q.** What are their policies? How do their policies prevent
21 that?

22 **A.** My understanding is you can't launch a store with
23 applications on the Google Play Store.

24 **Q.** If Epic were to launch on Android, how would its
25 policies -- if the Epic Game Store launched on Android, how

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1 would its policies on Android compare to its policies on PCs?

2 **A.** I would expect that they would largely stay the same.

3 **Q.** What do you expect would be the rev share that the
4 Epic Game Store offered on Android?

5 **A.** 88/12.

6 **Q.** And would you expect Epic to allow developers to choose
7 whatever payment platform they wish?

8 **A.** I do.

9 **Q.** Would you expect to try to distribute some free games to
10 users on Android?

11 **A.** I do.

12 **Q.** Would you expect to try to obtain any exclusive content on
13 Android?

14 **A.** As a strategic approach, yes, I do.

15 **MR. EVEN:** I have no further questions for the
16 witness.

17 **THE COURT:** Okay. Pass the witness.

18 **MR. MACH:** May I proceed, Your Honor?

19 **THE COURT:** Yes, please.

20 **CROSS-EXAMINATION**

21 **BY MR. MACH:**

22 **Q.** Good afternoon, Mr. Allison. It's nice to see you in
23 person, sir.

24 **A.** Same here. Good afternoon.

25 **Q.** So I want to start with some questions about how Epic runs

1 its own store to help the jury understand what's typical and
2 what's not typical for an app store. Okay?

3 So you've mentioned that the Epic Game Store distributes
4 third-party games; right, sir?

5 **A.** Yes.

6 **Q.** And when Epic does this, Epic insists on maintaining
7 absolute control over every aspect of its platform, doesn't it,
8 sir?

9 **A.** I don't understand the question.

10 **Q.** Well, Epic reserves the right to take any game off its
11 store at any time for any reason, doesn't it, sir?

12 **A.** We do.

13 **Q.** And, for example, Mr. Sweeney has told you that Epic
14 reserves the right to remove anybody from its platform if they
15 engage in payment practices that Epic doesn't like; right, sir?

16 **A.** I don't think that's the exact words, but I don't recall.

17 **MR. MACH:** Let's provide Mr. Allison with deposition
18 transcript number three, please.

19 Your Honor, with your permission --

20 **THE COURT:** I need to look at it first.

21 Thank you.

22 (Pause in proceedings.)

23 **THE COURT:** All right. What page?

24 **MR. MACH:** Page 158, Your Honor, lines 6 through 9,
25 are the heart of it.

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1 **THE COURT:** Do you remember your depo? Do you
2 remember it, Mr. Allison, the deposition?

3 **THE WITNESS:** I do. I remember the deposition.

4 **THE COURT:** Okay. Go ahead.

5 **BY MR. MACH:**

6 **Q.** And if you would turn, please, with me to page 157
7 starting on line 20. Let me know when you're there, sir.

8 **A.** I'm here.

9 **Q.** Okay. And you were asked, quote (as read):

10 **"QUESTION:** And here with regard to payments in
11 particular, Mr. Sweeney is saying Epic is reserving the
12 right to remove anybody from its platform if they engage
13 in payment practices that Epic does not like; correct?"
14 Do you see that, sir?

15 **A.** I see the question.

16 **Q.** And your answer was (as read):

17 **"ANSWER:** That is -- yeah, that's what he's saying."
18 Do you see that, sir?

19 **A.** I see the answer.

20 **Q.** And that was the testimony that you gave under oath at
21 that time; right, sir?

22 **A.** At that time.

23 **Q.** And you do this in part because you need to be able to
24 protect your platform for the benefit of all of its users and
25 not just think about what one particular developer might want;

1 isn't that right, sir?

2 **A.** That's not how I think of it. Can you expand?

3 **MR. MACH:** Your Honor, may I refer to what I've
4 described as transcript three?

5 **THE COURT:** What page number is it?

6 **MR. MACH:** 158, Your Honor.

7 **THE COURT:** 158. Okay. Lines?

8 **MR. MACH:** 158 it looks like 12 to 16.

9 (Pause in proceedings.)

10 **THE COURT:** Okay. It's fine.

11 **BY MR. MACH:**

12 **Q.** Mr. Allison, do you have your testimony on page 158 in
13 front of you, sir?

14 **A.** I do.

15 **Q.** And you recognize that you were asked with regard to our
16 prior conversation (as read):

17 **"QUESTION:** That is in part because you need to be able to
18 protect your platform for the benefit of all users and not
19 just think about one particular -- what one particular
20 developer might want?"

21 Do you see that, sir?

22 **A.** I see the question.

23 **Q.** And your answer was (as read):

24 **"ANSWER:** Yeah. Yes."

25 Correct, sir?

1 **A.** I see the answer with an objection, and I followed up with
2 more explanation following that answer, yes.

3 **Q.** Now, in order for your platform to succeed, you need to be
4 able to appeal to two different customers at the same time;
5 right? Consumers and developers; correct, sir?

6 **A.** Yes.

7 **Q.** You can't succeed with your platform unless developers
8 want to be on your platform; right?

9 **A.** Yes.

10 **Q.** And you discuss with Mr. Even minimum guarantees; right?

11 **A.** Yes.

12 **Q.** And that's an amount of money that developers on your
13 platform are guaranteed to receive regardless of the
14 performance of their game on your platform; right?

15 **A.** A small amount of strategic developers, yes.

16 **Q.** And you do that because you need to encourage developers
17 to leave a competitor like Steam and instead list on the
18 Epic Game Store; right?

19 **A.** As a strategic partnership, yes.

20 **Q.** And that's because you're competing with Steam for the
21 attention not just of customers but developers that might
22 otherwise do business with Steam; right?

23 **A.** We're happy for them to do business with both of us; but,
24 yes, in one context.

25 **Q.** When you issue those minimum guarantees, that is not what

1 you would characterize as a bribe; right, sir?

2 A. No.

3 Q. You do it because good content drives developers to your
4 store and customers to your store?

5 A. Good content drives customers to our store.

6 Q. You also have policies that are intended to keep your
7 store safe for users; right, sir?

8 A. Yes.

9 Q. And we would agree that safety and security are important
10 on a platform; right, sir?

11 A. Yes.

12 Q. It's also important to have trust on your platform; right,
13 sir?

14 A. Yes.

15 Q. And are you aware, sir, that Epic's lawyers take the
16 position that it was wrong for Google to warn customers of the
17 dangers of unknown sources of software?

18 A. I'm not aware of those specifics, no.

19 Q. Well, Epic itself has warned users that not all sources of
20 its software are safe; right?

21 A. I don't know what you're referring to.

22 Q. Well, Epic maintains what it calls an FAQ on its website;
23 right?

24 A. We maintain several FAQs on our website on different
25 topics.

1 Q. One of the topics is the Epic Game Store; right, sir?

2 A. Yes.

3 Q. And you were asked about the content of the FAQ back in
4 2021. Do you recall that, sir?

5 A. I don't recall it.

6 Q. Let me try a more specific question and see if you do
7 recall it. Okay?

8 At the time in 2021 the Epic Game Store FAQ on Epic's
9 website told consumers that Epic's website was the only place
10 to safely download the installer for Epic's game store and that
11 users shouldn't trust other sources because they are likely
12 unsafe. That's what it said then; right, sir?

13 A. I don't know. I'd have to see it.

14 Q. I can help.

15 MR. MACH: If we may turn back to deposition
16 transcript three, Your Honor.

17 THE COURT: Just give me the page number, okay?

18 MR. MACH: Yes. 246.

19 THE COURT: 246. All right. And which line?

20 MR. MACH: Starting line 17 proceeding to line 5 on
21 the next page, Your Honor.

22 (Pause in proceedings.)

23 THE COURT: Okay. Go ahead.

24 MR. EVEN: Objection. It seems like he said he
25 doesn't recall, so I don't know what we're impeaching.

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1 **THE COURT:** I can't hear you.

2 **MR. EVEN:** I'm sorry, Your Honor. Let me step up
3 here.

4 Can you hear me now?

5 **THE COURT:** Yeah.

6 **MR. EVEN:** I'm saying --

7 **THE COURT:** There should be one on the table too so
8 you don't have to go all the way back.

9 Okay. Go ahead. What's your objection?

10 **MR. EVEN:** The objection is that I believe the witness
11 just testified he doesn't remember, and so I'm not sure this is
12 a proper impeachment, Your Honor.

13 **THE COURT:** Well, he doesn't call it impeachment.
14 He's just showing him the deposition.

15 Okay. Go ahead.

16 **BY MR. MACH:**

17 **Q.** Mr. Allison, if you would, please, turn with me to
18 page 246 of the testimony that you gave under oath in what
19 we've called transcript three. Are you there, sir?

20 **A.** I'm on 246.

21 **Q.** 246, yes. Thank you, sir.

22 And you were asked on line 18 about the FAQ. Do you see
23 that?

24 **A.** I'm reading it. Sorry.

25 (Witness examines document.) I see the answer and I see

1 the question.

2 Q. The question you were asked about the FAQ was (as read):

3 "QUESTION: And then it says 'Visit the Epic Games' page
4 at epicgames.com, go to the right-hand corner and click
5 'get Epic Games.' This is the only place to safely
6 download the installer for the Epic Game Stores. Do not
7 trust other stores as they are likely unsafe.'"

8 Do you see that? That was the question; right, sir?

9 A. I see it.

10 Q. And you said, "Yes"; right, sir?

11 A. I said, "That's what the FAQ said, yes."

12 Q. Right. You were further asked "That's what the FAQ said
13 in May 2021"; correct, sir?

14 A. Yes.

15 Q. And you said, "Yes"; correct, sir?

16 A. Yes.

17 Q. And does that refresh your recollection, sir, that the FAQ
18 contained that warning in 2021 when you testified?

19 A. I'm refreshed now. I don't remember this exchange with
20 you guys.

21 Q. Okay. You're refreshed now, though; correct, sir?

22 A. I'm refreshed of this content, yes.

23 Q. And the warning that was made in that FAQ, that's as true
24 today as it was then; right?

25 A. I don't know.

1 Q. You are the general manager of the Epic Game Store; right,
2 sir?

3 A. I am. But if you're asking me if the content on the FAQ
4 has changed, I don't know.

5 Q. I'm just asking whether the substance of the warning is as
6 true today as it was in 2021?

7 A. In -- yes.

8 Q. Shifting gears a little, Mr. Allison, part of the services
9 that Epic offers to third-party game developers is payment
10 processing. You testified about that earlier; right?

11 A. Yes, on the Epic Game Store as an option.

12 Q. And if a developer offers a game that the user pays to
13 download through the Epic Game Store, in that circumstance Epic
14 requires that they use Epic's payment processing service,
15 doesn't it, sir?

16 A. Can you say the question one more time?

17 Q. Of course.

18 If a developer offers a game that the user pays to
19 download through the Epic Game Store, Epic requires them to use
20 Epic's payment processing service; correct, sir?

21 A. That's because it's a transaction in our application, yes.

22 Q. The answer is yes; right, sir?

23 A. Yes.

24 Q. Okay. Thank you.

25 And Epic has maintained that policy in part because it

1 wants to maintain the revenue from that as part of the business
2 model it chose when it designed its platform; correct?

3 **A.** That's not the fundamental reason why.

4 **Q.** Is it part of the reason why, sir?

5 **A.** That's certainly part of the reason why, but there's more
6 complexity to that.

7 **Q.** Now, as you talked about earlier, until very recently Epic
8 also required developers to use Epic's payment processing
9 services for in-app purchases in games distributed on the Epic
10 Game Store; right, sir?

11 **A.** We changed that four years ago; but until four years ago,
12 yes.

13 **Q.** Sir, did Epic make that change in its policy in 2019 so
14 that its policy wouldn't look similar to Google's when it
15 launched Project Liberty?

16 **A.** That's not the reason I was pushing the change in our
17 policy.

18 **Q.** You're familiar with Project Liberty; right, Mr. Allison?

19 **A.** I am.

20 **Q.** And you're aware that Project Liberty involved the Hotfix
21 that we talked about earlier today; right, sir?

22 **A.** I'm not aware of the details of how Project Liberty was
23 executed.

24 **Q.** Well, that's not quite my question, sir.

25 My question is whether you're aware that Project Liberty

1 involved a Hotfix that changed Epic's app so that users could
2 choose whether to use Google Play Billing or to use Epic's
3 billing system for in-app purchases on Android. You're aware
4 of that; right?

5 **A.** I am aware of that.

6 **Q.** Okay. And that is the crux of why we're sitting here
7 today in this antitrust litigation; right, sir?

8 **A.** I'm not the person to ask that question of.

9 **MR. MACH:** Your Honor, if I may, page 161, line 7.

10 (Pause in proceedings.)

11 **THE COURT:** That's fine.

12 **BY MR. MACH:**

13 **Q.** Mr. Allison, do you have your testimony under oath in your
14 deposition, page 161, in front of you, sir?

15 **A.** I see it.

16 **Q.** And you were asked (as read):

17 **"QUESTION:** So Project Liberty involved a Hotfix that was
18 implemented in 2020?"

19 Correct, sir?

20 **A.** Yes.

21 **Q.** And you said, "Right"; correct?

22 **A.** Yes.

23 **Q.** You were then asked (as read):

24 **"QUESTION:** To Fortnite's Google Play Store; correct?"

25 And you answered (as read):

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1 **"ANSWER:** Right. It's the crux of the reason we're
2 sitting here today in the antitrust litigation."

3 Correct, sir?

4 **A.** That's what I said then it looks like.

5 **Q.** That's the testimony you gave under oath at that time;
6 right, sir?

7 **A.** Yes.

8 **Q.** Now, when Epic changed its policy to allow developers to
9 use alternative billing services for in-app purchases, Epic's
10 CEO was in fact laying the tracks for Project Liberty, wasn't
11 it, sir?

12 **A.** I don't know that for certain.

13 **Q.** Do you have that belief, sir?

14 **A.** I have wondered about that, but I don't know for certain.

15 **Q.** Well, you have told your colleagues inside of Epic, right,
16 sir, that that change in Epic's billing policy was an act by
17 Mr. Sweeney laying the tracks for Project Liberty, haven't you?

18 **A.** I don't think that's what I said specifically.

19 **MR. MACH:** Your Honor, if I may, it's Exhibit 9001.

20 **THE COURT:** I don't have an exhibit --

21 **MR. MACH:** It's behind -- I'm sorry, Your Honor.

22 **THE COURT:** Remember, you're supposed to give me a
23 little binder at the beginning of each exam.

24 (Pause in proceedings.)

25 **THE COURT:** And two copies, please. And the witness

1 needs one too.

2 **MS. BECVK:** I believe this is impeachment, Your Honor.
3 I have the binder separately.

4 **THE COURT:** It's okay for now.
5 Does the witness have a copy?

6 **THE WITNESS:** Not yet.

7 **THE COURT:** We need one for the witness, please.

8 **MR. MACH:** And, Your Honor, if it's helpful --

9 **THE COURT:** Just one second.

10 **MR. MACH:** -- in the middle of the page ending 0003.

11 **THE COURT:** Just a moment.

12 **MR. MACH:** I apologize, Your Honor.

13 **THE COURT:** All right.

14 (Pause in proceedings.)

15 **THE COURT:** Okay. Any objection to 9001, Plaintiffs?

16 **MR. EVEN:** Your Honor, I don't believe it's being
17 offered as evidence.

18 **THE COURT:** Are you going to offer it?

19 **MR. MACH:** Your Honor, I intended to use it for
20 impeachment purposes and then perhaps offer it.

21 **THE COURT:** Why don't you offer it first and let's
22 just get it done with.

23 **MR. MACH:** Okay.

24 **THE COURT:** Any objection?

25 **MR. EVEN:** Your Honor, this wasn't disclosed to us,

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1 but let me look at it for a sec.

2 (Pause in proceedings.)

3 **MR. EVEN:** No objection, Your Honor.

4 **THE COURT:** Okay. 9001 is admitted.

5 (Trial Exhibit 9001 received in evidence.)

6 **THE COURT:** Go ahead.

7 **BY MR. MACH:**

8 **Q.** Mr. Allison, do you have what is Trial Exhibit 9001, sir?

9 **A.** I do.

10 **Q.** And this is a record of a Slack thread between you and
11 someone named Tera Randall in August of 2020; correct, sir?

12 **A.** Yes.

13 **THE COURT:** You can put this on the screen. Yeah,
14 okay. Good.

15 Jury members, are your video things on?

16 **A JUROR:** Yes.

17 **THE COURT:** Okay. Good.

18 Go ahead.

19 **BY MR. MACH:**

20 **Q.** Do you need the question back, sir?

21 **A.** I'm good. I see it.

22 **Q.** Okay. Just so the record is clear, my question was: This
23 is a record of a Slack thread between you and someone named
24 Tera Randall on August 11, 2020; correct, sir?

25 **A.** Yes.

1 Q. And Ms. Randall is another Epic executive, the vice
2 president of corporate communications at Epic; right, sir?

3 A. Yes.

4 Q. And this is a thread discussing Project Liberty. It says
5 there at the top (as read):

6 "Hey there, are you read in on Project Liberty?"

7 Do you see that, sir?

8 A. Yes.

9 Q. And if you would turn with me to page 2 of the document,
10 at the bottom there is a discussion of the policy change that
11 you were just testifying about; right, sir?

12 A. I brought it up in response to her dialogue with me.

13 Q. And turn with me, please, to page 3 of the document.

14 I can help. The second comment -- the second message from
15 the top from you, you say (as read):

16 "On EGS we allow anyone to use their own payments or
17 use ours. We took that decision last Q4. So that context
18 is important for all execs to understand."

19 Do you see that, sir?

20 A. I do.

21 Q. And that was a reference to the change in the billing
22 policy that we just talked about; right, sir?

23 A. Which billing policy? The EGS, IAP, or the Hotfix?

24 Q. The change in the billing policy where Epic started
25 allowing developers to use their own payment processor for

1 in-app purchases.

2 **A.** So that we could get Riot and Ubisoft using their own
3 payments for IAP, yes.

4 **Q.** Focus with me, please, for a minute, sir.

5 **A.** Yep.

6 **Q.** This conversation here, this comment was a reference to a
7 change in that policy; correct, sir?

8 **A.** It is.

9 **Q.** And if you look two comments down, you told your colleague
10 at Epic Games, quote (as read):

11 "That was purposeful by Tim laying the tracks for
12 this moment."

13 Do you see that, sir?

14 **A.** Followed by "Pretty sure," but, yes. "Pretty sure" means
15 I'm not sure just so you understand.

16 **Q.** And this was almost to the day -- this was almost to the
17 day the date that the Hotfix was released; right, sir?

18 **A.** I don't know the date of the Hotfix.

19 **Q.** If you'll --

20 **MR. MACH:** Your Honor, if I may, transcript three,
21 166.

22 **THE COURT:** Do you have it?

23 Why don't you just tell him the date and see if that
24 refreshes his recollection.

25 \\\

1 **BY MR. MACH:**

2 **Q.** Does it refresh your recollection, sir, that the Hotfix
3 was released on August 13, 2020?

4 **A.** The Hotfix?

5 **Q.** The Hotfix.

6 **A.** It doesn't. I may have known it. I don't have that date
7 memorized. It's not something I focus on at work.

8 **Q.** Well, let me try to make this a little simpler.

9 When you say "laying the tracks for this moment," you were
10 referring to the Hotfix in that Slack message; right, sir?

11 **A.** I was referring to Project Liberty as I was being read in
12 and I wasn't sure, but I was referring to what I was being
13 told, yes.

14 **Q.** Now, you've talked about the fact that the Epic Game Store
15 charges a 12 percent commission for a third-party app
16 transaction; right, sir?

17 **A.** Yes.

18 **Q.** Now, outside of PC, the 70/30 revenue split is really what
19 the industry uses; right, sir?

20 **A.** On many platforms, yes.

21 **Q.** In most other places the 70/30 revenue split is what the
22 industry uses right now; right, sir?

23 **A.** Yes.

24 **Q.** Nintendo charges 30 percent; right, sir?

25 **A.** Yes.

1 Q. And Sony charges 30 percent; right, sir?

2 A. Yes.

3 Q. And Microsoft charges 30 percent on its console; right,
4 sir?

5 A. On its console.

6 Q. Now I want to pause for a moment on Sony's 30 percent
7 commission.

8 Sony faces competition; right, sir?

9 A. We all face competition but, sure, yes.

10 Q. Microsoft's Xbox and Sony, they are a very one-to-one,
11 they very much compete for the same customer; right, sir?

12 A. Some cases, yes, not all.

13 Q. And Nintendo, they compete against Sony and Microsoft too;
14 right, sir?

15 A. In some cases.

16 Q. Now, Epic charges much less than those others we know;
17 right? And for in-app purchases you explained that actually
18 Epic doesn't charge anything for the games distributed on its
19 platform for in-app purchases; right?

20 A. Only if a developer chooses its own payment solution.

21 Q. And you also talked about how the exclusive deals that the
22 Epic Game Store was entering were working very well. Do you
23 recall that testimony?

24 A. They did work very well, yes.

25 Q. But at the 12 percent commission, sir, the Epic Game Store

1 is losing a substantial amount of money, isn't it?

2 **A.** We're investing in the platform's growth. The minimum
3 guarantee deals are part of that investment, and we understood
4 that they wouldn't recoup 100 percent.

5 **Q.** I appreciate that, sir.

6 But the answer is, yes, at the 12 percent commission, the
7 Epic Game Store is losing a very significant amount of money?

8 **A.** The 12 percent commission is not why the Epic Game Store
9 is losing money.

10 **Q.** Well, the Epic Game Store is not profitable; right, sir?

11 **A.** It is not profitable because we're investing in its
12 growth.

13 **Q.** In fact, profitability in third-party publishing is not
14 even a goal for the Game Store today; right?

15 **A.** Third-party games on the Epic Game Store are a low-margin
16 business. It's not our number one focus right now.

17 **Q.** Now, Epic forecasts that someday it will be profitable
18 with the Epic Game Store; right?

19 **A.** We do.

20 **Q.** And is the current plan that the Epic Game Store will be
21 profitable by 2024?

22 **A.** No.

23 **Q.** When does the -- when do you currently anticipate the
24 Epic Game Store will be profitable?

25 **A.** It's going to depend on the trajectory of our growth and

1 based on a number of investments that we make in free games and
2 our strategic partnerships. It could be as early as '25 or
3 '26, but it may be later if we see the growth of the platform
4 continue to go at the trajectory it's on today.

5 Q. It could be 2025 or 2026; right, sir?

6 A. If we decided to discontinue our investments.

7 Q. But a prior plan estimated that you would be profitable by
8 2024, didn't it?

9 A. There have been versions of many plans. I'm sure one of
10 them did.

11 Q. And, actually, you also previously believed that that app
12 store would be profitable by 2023, didn't you, sir?

13 A. There was a version we were profitable in 2023, but we've
14 seen better results in our investments and have continued to
15 invest.

16 Q. But you previously thought that the Epic Game Store was on
17 the road to profitability by 2023, didn't you?

18 A. At one time, yes.

19 Q. And you've also previously thought that you'd have a
20 sustainable platform that hit profitability on the third-party
21 side by 2022; right?

22 A. There was a version of that that could have happened too,
23 but we would have pulled out of the free games program and done
24 less partnerships.

25 Q. Do you have a sense today of how much money the Epic Game

1 Store has lost?

2 A. I do.

3 Q. And what is that, sir?

4 A. We've invested about 500 million in its growth over the
5 first five years.

6 Q. You use the word "invested." I understand what you mean.
7 I just want the record to be clear.

8 Epic has lost about \$500 million so far in the Epic Game
9 Store; right, sir?

10 A. We spent 500 million on our investments on the Epic Game
11 Store.

12 Q. You've spent \$500 million more than you've earned on the
13 Epic Game Store; correct, sir?

14 A. Correct.

15 Q. Okay. But as I think you testified, the Epic Game Store
16 brings other benefits to Epic even if the portion funded by the
17 rev share is not profitable; correct?

18 A. It's not the portion funded by the rev share that's not
19 profitable. We're spending money on growth programs.

20 Q. Well, let me focus a little bit.

21 One of the reasons that you started the Epic Game Store is
22 to cross-pollinate different -- with different businesses in
23 Epic; right?

24 A. Can you explain that a little bit?

25 Q. Sure.

1 So one of the benefits of the store is that players who
2 come to the store might start playing Fortnite; right?

3 **A.** Absolutely.

4 **Q.** Right. And then they might make purchases within
5 Fortnite; right?

6 **A.** It's possible.

7 **Q.** And that's a benefit to Epic standing alone from other
8 revenue from the Game Store; right?

9 **A.** No. That's a benefit for everybody in the Game Store. It
10 applies equally to every game in the Epic Game Store. We all
11 benefit from each other's traffic.

12 **Q.** Well, do other developers earn revenue when a customer
13 makes a purchase in Fortnite, sir?

14 **A.** Of course not.

15 **Q.** Now, in addition to the businesses that we've been talking
16 about, Epic also runs a third-party publishing business called
17 Epic Games Publishing; right, sir?

18 **A.** We do.

19 **Q.** And Epic Games Publishing is part of the Epic Game Store
20 and it reports to you; right?

21 **A.** It's not part of the Epic Game Store, but it is part of my
22 organization.

23 **Q.** And in that program Epic pays development costs for
24 developers; right, sir?

25 **A.** We fund projects fully, yes.

1 Q. But Epic doesn't take 12 percent of revenue for those
2 projects; right?

3 A. That's because a publishing-funded project is not a
4 distribution on a store.

5 Q. One second, sir.

6 The answer is, no, right, it doesn't take 12 percent of --

7 A. It does not take 12 percent.

8 Q. Through Epic Games Publishing, Epic takes 100 percent of
9 the developer's revenue until Epic recoups its cost and then it
10 takes 50 percent -- a 50 percent share from then on; right?

11 A. That's how publishing projects work, and that's the best
12 deal in the video game industry.

13 Q. Just so we're clear, the answer is yes; correct, sir?

14 A. Yes.

15 Q. Okay. Thank you.

16 And Epic takes that revenue share from the developer even
17 if the game is sold outside of the Epic Game Store like on a
18 console; right?

19 A. You're mixing distribution and funded projects. I'm -- I
20 can't give you an answer. That doesn't make sense.

21 Q. We'll get to the validity of the comparison at some point
22 I just want to understand the details here for a moment.

23 Epic take a 50 percent revenue share even if the game is
24 sold outside of the Epic Game Store like on a console; right?

25 A. We fully fund a project, we recoup the project, and then

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1 we split the revenues with our partner. It's not distribution.

2 **MR. MACH:** Your Honor, if I may, page 38.

3 **THE COURT:** 38. Which line?

4 **MR. MACH:** Line 4 to line 9.

5 **THE COURT:** Okay. That's fine.

6 **BY MR. MACH:**

7 **Q.** Mr. Allison, could you turn to your deposition, please?

8 **A.** This one (indicating)?

9 **Q.** That's number three. It should be number three.

10 **THE COURT:** Yeah, just page 38.

11 **THE WITNESS:** Page 38?

12 **THE COURT:** Yeah.

13 **THE WITNESS:** Okay. Sorry.

14 **BY MR. MACH:**

15 **Q.** Now, sir, in your deposition under oath on page 38, you
16 were asked (as read):

17 **"QUESTION:** If the product is sold for play on a console,
18 for example, then Epic would take 50 percent of that sale;
19 correct?"

20 Do you see that, sir?

21 **A.** I see what -- I see the question.

22 **Q.** Right.

23 And your answer was (as read):

24 **"ANSWER:** Of the net -- of the net revenues, yes."

25 **A.** That's correct.

1 Q. Is that correct, sir?

2 A. That is correct.

3 Q. That is the question you were asked and that was the
4 answer you gave under oath at the time; correct, sir?

5 A. That is correct.

6 Q. Okay. And Epic takes that 50 percent revenue share from
7 that developer forever as long as you have the rights to sell
8 the game; right?

9 A. That is because we are the publisher of that game.

10 Q. Sir, I want you to focus on my question for a moment.

11 My question is: Epic takes that 50 percent revenue share
12 from the developer forever as long as you have the rights to
13 sell the game; right?

14 A. As publisher, yes.

15 Q. Now, it sounds like you're saying that I'm not making a
16 fair comparison; is that right, sir?

17 A. They are not the same thing in any stretch.

18 Q. Now, do you know that Epic's expert witnesses say that
19 it's fair to compare Google's app store commissions to the
20 commissions that a company like PayPal charges for payment
21 processing? Do you know that, sir?

22 **THE COURT:** Let's try a different question.

23 **MR. MACH:** Sure. No problem, Your Honor.

24 Q. Now, focusing on your 12 percent commission, it wouldn't
25 be accurate to characterize Epic's 12 percent commission as

1 just a payment processing fee, would it, sir?

2 **A.** No. There are other costs in there.

3 **Q.** The commission on your platform is a payment for access to
4 your audience; right, sir?

5 **A.** I don't believe that's the case. I may have said it, but
6 I don't actually -- that's not the truth.

7 **Q.** You said it under -- do you recall saying that under oath,
8 sir?

9 **A.** I do. That one I remember, but it's not how I feel. I
10 feel like I got twisted into that answer.

11 **Q.** To save time, I'll just ask.

12 **A.** Yeah.

13 **Q.** You've testified under oath, right, that --

14 **A.** Let's look at it, please.

15 **Q.** I'm happy to, sir.

16 Let's take the transcripts -- the transcript labeled
17 number two, which we'll have to distribute.

18 **THE COURT:** Let's just do the page -- please, just the
19 page numbers. We've got them all here. No twos, threes. Only
20 you know that. Just help the judge out. Just give me a page
21 number.

22 **MR. MACH:** I apologize, Your Honor. It's a different
23 transcript, so we'll have to distribute it.

24 **THE WITNESS:** Okay.

25 **THE COURT:** I have 363 pages. There's more?

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1 **THE WITNESS:** There is. There's lots of pages.

2 **MR. MACH:** Apologies, Your Honor.

3 **THE COURT:** All right. Great.

4 Okay. It's handy to use this thing if you can.

5 At least they're consecutive. Okay. Which page?

6 **MR. MACH:** 1271 please, Your Honor.

7 **THE COURT:** 1271. Okay.

8 (Pause in proceedings.)

9 **THE COURT:** All right. Which line?

10 **MR. MACH:** I need a moment myself, Your Honor. I
11 believe it's line 21.

12 **THE COURT:** All right.

13 (Pause in proceedings.)

14 **THE COURT:** All right. Well, I'm a little confused
15 about what's happening, so just use it as a table-setting
16 device. All right?

17 **MR. MACH:** No problem, Your Honor.

18 **BY MR. MACH:**

19 **Q.** So the question, sir, as a table-setting device is: Epic
20 doesn't view Epic Game Store commission as a process payment
21 fee but, rather, a payment for access to your audience? That's
22 right, isn't it, sir?

23 **A.** I said it's a way to say it, but I also feel twisted into
24 that answer.

25 **Q.** That is the answer that you gave under oath, though, sir;

1 right? You said, "Yes. It's a way to say it, yes"?

2 A. I did say that, yes.

3 Q. We would agree, in any case, that comparing Epic's
4 commission to a payment processing fee charged by something
5 like a credit card would be apples to oranges because, among
6 other things, a developer cannot present a game to 60 million
7 users with a payment processor; right?

8 A. That is correct.

9 Q. Right. Now, 60 million users, that is your audience;
10 right, sir?

11 A. It's larger now, but close.

12 Q. Now, you've talked about one of your competitors called
13 Steam; right?

14 A. I have.

15 Are you talking about testimony? Yes.

16 Q. Yeah. Yeah. I'm sorry. Today, sir.

17 And the revenue share that Steam takes is higher than the
18 revenue share that Epic Game Store takes. You testified to
19 that; right?

20 A. Yes.

21 Q. Okay. Because Steam sometimes takes 30 percent; right?

22 A. Sometimes.

23 Q. But Steam can also give developers a much bigger audience
24 than the Epic Game Store; right?

25 A. Their audience is larger than our audience.

1 Q. It's about twice the size of your audience; right, sir?

2 A. Approximately.

3 Q. And Steam also has a vastly larger catalog than the
4 Epic Game Store has; right?

5 A. They do.

6 Q. You testified, I think, you have about 3,000 titles;
7 right, sir?

8 A. Yes.

9 Q. And Steam has 40- or 50,000 titles; right?

10 A. They have about 130,000 titles now actually.

11 Q. Oh, bigger than I thought. 130,000 titles?

12 A. Yeah.

13 Q. Now, Google Play's revenue share on the Play Store is also
14 higher than what Epic charges on the Epic Game Store; right?

15 A. Yes.

16 Q. But when a developer lists their product on the Google
17 Play Store, they also get access to a much larger audience than
18 the audience available through the Epic Game Store; correct?

19 A. Yes.

20 Q. And Google Play has millions of apps; right? Many more
21 than are available on the Epic Game Store?

22 A. I don't know. I know you have millions of apps and I know
23 we have 3,000, so I guess the answer is yes.

24 Q. And you would agree, right, sir, that it is not fair to
25 characterize charges on Google Play as just for payment

1 processing? Right?

2 **A.** I feel you're twisting a bunch of things into something
3 that they aren't.

4 **MR. MACH:** Your Honor, if I may, page 262 of the first
5 transcript we handed you.

6 **THE COURT:** Okay. Line number? Which line?

7 **MR. MACH:** Starting on line 14, Your Honor.

8 **THE COURT:** Okay.

9 **BY MR. MACH:**

10 **Q.** Mr. Allison, are you on page 262 of the sworn testimony
11 that you gave in January of 2022, sir?

12 **A.** I'm on the page.

13 **Q.** And you were asked starting on line 7 (as read):

14 **"QUESTION:** One difference between a simple payment
15 processor and a platform that can offer more value is the
16 fact that that platform might be able to reach a large
17 number of users; right?"

18 And you answered "Yes."

19 Do you see that, sir?

20 **A.** Yeah, sure. Yes.

21 **Q.** And then you were asked (as read):

22 **"QUESTION:** Given that, it's not fair to characterize
23 Google's charges on Google Play as just payment processing
24 either, is it, sir?"

25 Do you see that?

1 **A.** I see the question.

2 **Q.** And your answer under oath was "No." Do you see that?

3 **A.** I see the answer "No," yes.

4 **Q.** You actually said (as read):

5 **"ANSWER:** No. I've never thought of it that way myself."

6 Right, sir?

7 **A.** I see the answer. I'm trying to read the whole thing for
8 full context to where this conversation is going.

9 Can you ask your question again?

10 **Q.** Yes, sir.

11 When you were deposed in January of 2020, you were asked
12 (as read):

13 **"QUESTION:** It's not fair to characterize Google's charges
14 on Google Play as just payment processing either, is it,
15 sir?"

16 And your answer was (as read):

17 **"ANSWER:** I said, no, I've never thought of it that way
18 myself."

19 Correct?

20 **A.** Yeah. I don't think of it as just payment processing.
21 There's a number of other marginal costs that we have when we
22 take our rev share.

23 **Q.** But we're talking --

24 **A.** That's how I think of it.

25 **Q.** We're talking here about Google Play, sir, not your store;

1 right?

2 A. Well, we all have similar marginal cost structure.

3 Q. Right. When a customer purchases -- when a developer uses
4 Google Play, they engage with a whole bunch of services
5 provided by Google Play that have a cost for Google besides
6 payment processing is what you're saying; right, sir?

7 A. That are unique to Google or just other things that are
8 required to complete a transaction?

9 Q. All sorts of other things; right, sir?

10 A. There are other things to complete a transaction besides
11 processing a payment, yes.

12 Q. And that's part of what the developer gets when they pay
13 for payment processing with Google; right, sir?

14 A. That's what they get when they process a payment with
15 anyone on a storefront.

16 Q. Including Google Play?

17 A. Yes.

18 Q. Now, you talked about the fact that Epic would like to
19 compete on Android with its own Play Store. Do you remember
20 that, sir?

21 A. Yes.

22 Q. Now, Epic has an Android app right now; right?

23 A. Yes.

24 Q. And Android users can download it by going to
25 epicgames.com; correct, sir?

1 **A.** Yes.

2 **Q.** But you don't consider the Google Play Store a competitor
3 with the Epic Game Store now, do you, sir?

4 **A.** We're not on Android with the Epic Game Store so, no.

5 **Q.** Now, when you were brought on to build up the Game Store
6 at Epic, the key business goal was to disrupt the revenue
7 shares on PC, not on mobile; right?

8 **A.** It was starting on PC, and we did talk about Android
9 often.

10 **Q.** Sir, it wasn't a goal of the Epic Game Store to reduce
11 commissions on any platform other than PC, was it, sir?

12 **A.** It was never my -- my goal as the leader of the Epic Game
13 Store was to create an environment where developers could
14 maximize the success from their games with a great rev share.

15 **Q.** Right, sir.

16 And it was not a goal of the Epic Game Store to put
17 pressure on other platforms to reduce their respective
18 commissions except on PC; right?

19 **A.** We launched on PC first. I'm not putting pressure on
20 anyone with the Epic Game Store. If you react, you react.

21 **Q.** Right. Your intention is not to put pressure on pricing
22 on other platforms; right? That's not what you're trying to
23 do?

24 **A.** We're trying to disrupt the norms for sales of the games
25 digitally by offering an alternative to the 70/30.

1 Q. Now, if Epic -- if the Epic Game Store was successful in
2 driving down commissions on mobile, that would help Epic
3 financially; right?

4 A. We're already not on Google Play. So I don't think it
5 changes much for Epic.

6 Q. Well, if Epic had the opportunity to distribute on
7 Google Play with a lower commission, then that would benefit
8 Epic financially; right?

9 A. If we were on Google Play.

10 Q. Because Epic itself would then pay lower commissions when
11 it sold its games; right?

12 A. Our in-app purchases, yes.

13 Q. Now, you testified earlier today that you didn't think it
14 was possible to distribute the Epic -- an Epic Game Store for
15 mobile because sideloading was too difficult; right?

16 A. Not difficult. Fraught with consumer friction.

17 Q. Let me ask that a little differently.

18 The consumer friction issue goes to whether or not you can
19 successfully distribute your Game Store on mobile by a
20 sideloading; right, sir?

21 A. No.

22 Q. Well, you don't have an understanding of how successfully
23 an app can be distributed on the Android ecosystem by a
24 sideloading, do you?

25 A. I know our numbers on Fortnite are disappointing.

1 **MR. MACH:** Your Honor, if I may, 173 in the first
2 transcript.

3 **THE COURT:** Line number, please.

4 **MR. MACH:** Line 12, Your Honor.

5 **THE WITNESS:** Which page?

6 **MR. MACH:** 173, sir.

7 **THE COURT:** Okay.

8 **BY MR. MACH:**

9 **Q.** So, sir, just to reorient, sideloading is one way that an
10 app can be distributed to Android users without the use of
11 Google Play; right?

12 **A.** Yes.

13 **Q.** But you do not have an understanding of how successfully
14 an app can be distributed on the Android ecosystem via
15 sideloading, do you, sir?

16 **A.** Because I've never seen one successfully distributed, yes,
17 so I do not understand how to be successful in it.

18 **Q.** Sir, are you with me on page 173 of the deposition
19 transcript?

20 **A.** I am.

21 **Q.** Do you see on line 12 you were asked the question (as
22 read):

23 **"QUESTION:** And do you have an understanding of how
24 successfully an app can be distributed on the Android
25 ecosystem via sideloading?"

1 That was a question you were asked; right, sir?

2 A. Yes.

3 Q. And your answer was (as read):

4 "ANSWER: Not my area so, no."

5 Right, sir?

6 A. That's the answer I gave, yes.

7 Q. That's the testimony you gave under oath at that time;
8 right?

9 A. That is.

10 Q. And by that time, Epic had already attempted to launch
11 Fortnite on Android without Google Play; right?

12 A. Yes.

13 Q. Now, some developers publish games on the Epic Game Store
14 and Steam at the same time; correct?

15 A. Yes, many.

16 Q. You're familiar with the term "SIM shipping" for that;
17 right, sir?

18 A. Yes.

19 Q. And we talked about the fact that Steam charges more than
20 you; right, sir?

21 A. In rev share?

22 Q. Mm-hmm, yes.

23 A. Yes.

24 Q. But when the games are actually sold to consumers, the
25 vast majority of those games are sold for the same price on the

1 Epic Game Store as they are on Steam; correct?

2 A. Correct.

3 Q. Now, if I -- as a consumer, I want to play Fortnite, I
4 have lots of different ways to do it; right?

5 A. By platform choice, yes.

6 Q. I could do it on a PC; right?

7 A. Yes.

8 Q. Or a Mac; right?

9 A. Yes.

10 Q. I could do it on a Nintendo; right?

11 A. Yes.

12 Q. Or a PlayStation; correct?

13 A. Yes.

14 Q. I could do it on an Xbox; right?

15 A. Yes.

16 Q. I could do it using a streaming service like Nvidia
17 GeForce Now; right, sir?

18 A. Yes.

19 Q. And I could do it on an Android device by downloading the
20 game from www.epicgames.com; right?

21 A. Yes.

22 Q. Now, over your career you've seen lots of disruptive
23 changes in how games are distributed; right?

24 A. Yes.

25 Q. And you know we're sort of entering a potential new phase

1 of rapid transformation in how that happens; right, sir?

2 **A.** We have in some areas, yes.

3 **Q.** Well, streaming, for example, that's a new emerging space;
4 right?

5 **A.** It's not anymore. It's been a pretty disappointing space
6 overall. I don't know what you're referring to in answer from
7 what time period.

8 **Q.** Well --

9 **A.** We've seen lots of disappointment in streaming including
10 with Stadia.

11 **Q.** I didn't mean to speak over you, sir. I apologize.

12 A lot of companies are trying to figure out streaming now;
13 right, sir?

14 **A.** Some companies are trying to figure out. Many have left.

15 **Q.** Now, you don't just work for Epic, but you're also a
16 player of Fortnite; right?

17 **A.** I am a very light player of Fortnite.

18 **Q.** Well, in the past you've played Fortnite on mobile
19 devices; right?

20 **A.** I have.

21 **Q.** You also owned both Android devices and IOS devices;
22 right, sir?

23 **A.** Yes.

24 **Q.** And you've actually seen debates in your own household
25 about the benefits of the iPhone versus Android; right?

1 **A.** I have.

2 **Q.** Now, you don't play Fortnite on mobile anymore; right?

3 **A.** No.

4 **Q.** You still -- you do still play it, though; right, sir?

5 **A.** Rarely.

6 **Q.** You play it on a console and a PC; right?

7 **A.** That's correct.

8 **Q.** Any inability to play Fortnite on mobile didn't impact
9 your ability to play Fortnite; right, sir?

10 **A.** Well, I can't play it on the road anymore. It impacts my
11 ability to play Fortnite.

12 **MR. MACH:** Sir, Your Honor, if I may, one last time
13 let's go to page 286 of his deposition transcript.

14 **THE COURT:** 286. Okay. Line number?

15 **MR. MACH:** 11, Your Honor.

16 **THE WITNESS:** 286.

17 **THE COURT:** That's fine.

18 **BY MR. MACH:**

19 **Q.** Do you have page 286 in front of you, sir?

20 **A.** I do.

21 **Q.** And on page 286 when you were under oath in January of
22 2022, you were asked (as read):

23 **"QUESTION:** The loss of the ability to play it on mobile
24 didn't impact your ability to play Fortnite then; right?"

25 Do you see that, sir?

ALLISON - REDIRECT / EVEN

1 **A.** I said -- my answer was "Not mine" because I wasn't
2 playing it on mobile at the time.

3 **Q.** Sir, your answer was "Not mine," period; correct?

4 **A.** Correct.

5 **Q.** You didn't give the rest of the answer that you just gave
6 today when you testified --

7 **A.** I apologize.

8 **Q.** -- in 2022; right, sir?

9 **A.** I apologize.

10 **Q.** Okay. Just so we're clear, that was the question that you
11 were asked and the answer that you gave was "Not mine";
12 correct?

13 **A.** Yes.

14 **MR. MACH:** Thank you, sir. No further questions at
15 this time.

16 **THE COURT:** Okay. Is there any brief redirect?

17 **MR. EVEN:** Yes, please, Your Honor. I'll try and be
18 brief.

19 **REDIRECT EXAMINATION**

20 **BY MR. EVEN:**

21 **Q.** Mr. Allison, you were asked about some FAQs on the
22 Epic Game Store. Do you remember that?

23 **A.** Yes.

24 **Q.** And those were FAQs about where to download Epic's own
25 launcher; correct?

1 **A.** Yes.

2 **Q.** Do you have anything about in your FAQs or anywhere
3 suggesting to people that it's unsafe to download other
4 people's software from certain sources?

5 **A.** No.

6 **Q.** You had a discussion about publishing, and you said it's a
7 bad comparison. Why is publishing a poor comparison to
8 distribution?

9 **A.** Distribution is the end result of a funded project coming
10 to market and a choice to where you sell your game.

11 Publishing is when a company like our publishing team will
12 fully fund a project that is an idea in someone's head. So
13 it's access to capital for funding a project that in a case in
14 some of our games can be as high as \$50 million.

15 Money for funding projects is really hard to come by these
16 days. It's either from VCs or from a very small select group
17 of publishers like Electronic Arts or Activision, people like
18 that.

19 The terms of those funded projects are not the same kind
20 of terms that you get when you have a fully completed project
21 coming to a store for distribution. Every business
22 relationship has rev share, but rev share and distribution is
23 not an apples to apples with a funded piece of entertainment.

24 **Q.** Thank you.

25 You were also talking about comparisons between payment

1 platforms and what Google charges. So I'd like for a second to
2 talk about what Epic charges, the 12 percent.

3 You said in your case that Epic has severed any kind of
4 relationship between whether a developer distributes on
5 Epic Game Store and whether the developer then has to take Epic
6 Direct Pay for in-app purchases; correct?

7 **A.** We allow it. We have a policy that allows you to make a
8 choice.

9 **Q.** And once you can make a choice, if the developer considers
10 whether or not to use Epic Direct Pay for in-app purchases,
11 what alternatives does that developer consider?

12 **A.** There's a few. So there's -- there's -- Epic Direct Pay
13 is available and pretty -- you know, it's there, it's easy for
14 people to set up.

15 If you decide to go for an alternative, you have to
16 consider how you run your business. A developer that wants to
17 process its own payments needs to bring on an expanded finance
18 team, fraud monitoring. They need to select a vendor. Those
19 vendors have costs. They will generally be cheaper. That
20 payment process tends to run between 4 and 6 percent. But they
21 have a lot of other considerations to make.

22 Many developers don't want to run their business with
23 those kinds of things to think about in their day-to-day.

24 **Q.** Understood.

25 So would PayPal, for instance, be an alternative to Epic

1 Direct Pay?

2 **A.** I don't know that they offer it for in-app purchase,
3 but -- that, I don't know. I know they are an option like a
4 credit card. I don't know that they offer payment processing.

5 **Q.** Do you know some names of companies that are offering
6 in-app purchase platforms?

7 **A.** Yeah. The big players in our space are a company called
8 Xsolla. There's a company called Ayden. There's a company
9 called Digital River that we used at Telltale for our store.
10 There's quite a few. There's probably more than 10 or 12 that
11 are competing with each other there.

12 **Q.** And when you say your space, you mean in the PC games?

13 **A.** Just in gaming in general, but largely their customers are
14 on a PC.

15 **Q.** Okay. Are those alternatives payment platforms or
16 distribution platforms?

17 **A.** Just payment.

18 **Q.** And in the same vein, if the same -- if Epic were to raise
19 its price from 12 percent to 20 percent on Epic Direct Pay for
20 in-app purchases, how would that affect the choice made by
21 developers whether to take Epic Direct Pay or another option?

22 **MR. MACH:** Objection, Your Honor. Calls for
23 speculation.

24 **THE COURT:** Well, in your experience, how would that
25 affect a developer?

1 **THE WITNESS:** I think they would have something new to
2 consider. They would have increased costs. So if you didn't
3 want to consider how you would staff up and manage that, you
4 would make that trade-off; like is it worth it.

5 It may end up in less people taking us up on -- or
6 going -- it may drive more people to take an alternative
7 payment solution, but there are all these other considerations
8 to make in terms of how you build your company and how you run
9 it.

10 **BY MR. EVEN:**

11 **Q.** Understood.

12 You said that you're on PC and, therefore, you do not
13 compete with the Google Play Store currently; right?

14 **A.** Not directly, no.

15 **Q.** And if Epic Games store were to launch on Android, would
16 it then become a competitor of Google Play?

17 **MR. MACH:** Your Honor, it's leading.

18 **THE COURT:** Oh, that's overruled.

19 I do want to our -- how much longer do you have? I want
20 to take our afternoon break.

21 **MR. EVEN:** This is my last question.

22 **THE COURT:** Okay. Good.

23 Go ahead. Overruled. Go ahead. Take it from the top so
24 we know what you're talking about.

25 \\

1 **BY MR. EVEN:**

2 **Q.** My question was simply if Epic Games Store were to launch
3 on Android, would you then think it would compete against
4 Google Play?

5 **A.** In the same way we compete against Steam, I think we'd be
6 competing in some form with the Google Play Store.

7 **MR. EVEN:** Thank you, Mr. Allison.

8 **THE COURT:** Okay. Any questions for the witness?

9 (No response.)

10 **THE COURT:** Okay. Careful on your way down.

11 (Witness excused.)

12 **THE COURT:** We'll take our 15-minute break and see you
13 back at 2:30. And remember we're going to wrap up at
14 3:30 today.

15 **THE CLERK:** All rise.

16 (Recess taken at 2:13 p.m.)

17 (Proceedings resumed at 2:32 p.m.)

18 (Proceedings were heard in the presence of the jury:)

19 **THE CLERK:** We're back on the record in Civil 20-5671,
20 Epic Games, Inc. vs. Google LLC, and Multidistrict Litigation
21 21-2981, In re Google Antitrust Store Litigation.

22 **THE COURT:** Okay. Who's next?

23 **MR. BORNSTEIN:** Your Honor, Epic calls Ben Simon to
24 the stand.

25 **THE COURT:** All right.

SIMON - DIRECT / BORNSTEIN

1 **THE CLERK:** If you'll please stand and raise your
2 right hand.

3 **BENJAMIN SIMON,**
4 called as a witness for the Plaintiff, having been duly sworn,
5 testified as follows:

6 **THE WITNESS:** I do.

7 **THE CLERK:** Thank you.

8 Please state your full name for the Court and spell your
9 last name.

10 **THE WITNESS:** Benjamin Simon. My last name is spelled
11 S-I-M-O-N.

12 **THE CLERK:** Thank you.

13 **DIRECT EXAMINATION**

14 **BY MR. BORNSTEIN:**

15 **Q.** Mr. Simon, good afternoon.

16 **A.** Good afternoon.

17 **Q.** Will you please tell the jury where it is you work?

18 **A.** The official company is Yoga BootyCo.

19 **Q.** And is there another name that it usually goes by?

20 **A.** Usually publicly we use the name Down Dog.

21 **Q.** And what kind of company is Down Dog?

22 **A.** We make a suite of consumer mobile and web apps for
23 at-home fitness.

24 **Q.** Where does the name Down Dog come from?

25 **A.** Down Dog is an important yoga pose. We also wanted to

1 make my dog the logo for the app, so that sort of made sense.

2 Q. And what's your job at Down Dog?

3 A. I'm one of the two founders and the CEO and president.

4 Q. When did you found the company?

5 A. Early 2015.

6 Q. And what did you do before you founded Down Dog?

7 A. I was a software engineer at Google.

8 Q. Why did you leave Google?

9 A. Me and my cofounder came up with the idea for Down Dog and
10 wanted to pursue it.

11 Q. Did you leave on good terms?

12 A. Absolutely. In fact, my backup plan if Down Dog didn't
13 work was always to return to Google.

14 Q. What kind of products does Down Dog have?

15 A. We have six apps. Our first and most popular app is our
16 yoga app, but we also have high-intensity interval training;
17 meditation; a running app; bar, which is a ballet-inspired
18 workout; and I'm forgetting -- oh, a prenatal yoga app.

19 Q. And approximately how many people every day do fitness
20 practice sessions on one of your apps?

21 A. It's roughly 100,000 people a day.

22 Q. And on what platforms can your users actually access those
23 classes?

24 A. We're available as native apps on both Android and IOS,
25 and then we also have a fully functioning web app that you can

1 access within browsers, such as Chrome or Safari, on any
2 operating system like Mac OS, Windows, or Linux.

3 **Q.** How does Down Dog make money?

4 **A.** We have a subscription model. So when a user downloads or
5 visits our website, if they create an account, all they have to
6 do is give us their e-mail address and they get two weeks free
7 to try out the app. And then if they want to continue using
8 it, they have to subscribe to either a monthly or an annual
9 subscription plan, which gives them access to all of the
10 content in all of the apps on all of the platforms.

11 **Q.** On which platforms can a user sign up to one of these --
12 sign up to one of these subscriptions? Excuse me.

13 **A.** On any of the three: Android, IOS, or the web.

14 **Q.** And how much does Down Dog charge for subscriptions?

15 **A.** Our typical standard pricing is -- in the app the pricing
16 is \$9.99 per month or \$59.99 per year; or if they purchase on
17 our website, the typical prices is 7.99 per month or 39.99 per
18 year.

19 **MR. BORNSTEIN:** So I'm going to ask Ms. McGuire to put
20 up on the screen a demonstrative to show what you just said in
21 graphic form. Can we do that?

22 **TECH PERSONNEL:** Ms. Clark, would you mind switching
23 over to our side, please? Thank you.

24 **MR. BORNSTEIN:** Great.

25 \\\

1 **BY MR. BORNSTEIN:**

2 **Q.** So, Mr. Simon, does this picture on the screen here
3 accurately depict Down Dog pricing as you just described it?

4 **A.** Yes, it does.

5 **Q.** And is that your dog, by the way, in the middle there?

6 **A.** That is.

7 **Q.** Can you explain, how long have you had this pricing
8 structure?

9 **A.** I believe this is the pricing we've had in place for
10 roughly four years.

11 **Q.** So why is it that Down Dog charges its users more when
12 they subscribe on Google Play versus when they subscribe on a
13 website?

14 **A.** Primarily that's to reflect the increased fees that we pay
15 when processing through Google Play, and so it's supposed to
16 reflect really the revenue that comes to us in the end.

17 **Q.** Let me just dig into the math on that just a little bit.

18 So when people sign up on the website, what choices do
19 they have to make a payment?

20 **A.** They can either pay with PayPal or they can enter credit
21 card information directly, in which case we process it with
22 Stripe.

23 **Q.** Okay. And if they use PayPal, how do you process that
24 transaction?

25 **A.** So the way that works is they would log into their PayPal

1 account to authorize the payment, and then PayPal essentially
2 sends us a message telling us that they've done so, so that we
3 can credit them.

4 **Q.** And when your users sign up on the web using PayPal or
5 their credit card, approximately how much does Down Dog pay to
6 process those transactions?

7 **A.** It varies because it's structured, I believe, as like
8 30 cents plus a tiny percentage; but all in all, it ends up
9 being roughly 3 percent.

10 **Q.** And then for your Android app distributed through
11 Google Play, do you also offer PayPal and credit card processes
12 through Stripe?

13 **A.** No. Google does not allow us to have those options within
14 the Android app.

15 **Q.** So what are you permitted to have on Android?

16 **A.** Only Google Play's billing.

17 **Q.** And what fee are you charged for Google Play Billing in
18 your Android app?

19 **A.** So I believe now we're charged 15 percent because it's a
20 subscription; but at the time that we set this pricing, that
21 was 30 percent.

22 **Q.** And given the discrepancy in price that you just
23 described, why does Down Dog use the Google Play Billing
24 product?

25 **A.** Google requires us to as the only payment solution we're

1 allowed to use within the Android app.

2 Q. You mentioned a reduction in price at one point from
3 30 percent to 15 percent. Do you recall the date when that
4 happened?

5 A. I believe they announced that change in the fall of 2021,
6 and it actually went into effect in January of 2022.

7 Q. January 2022 you said?

8 A. I think that's correct.

9 Q. And at that point in time, did Down Dog change the fee
10 structure that we see here?

11 A. We did not.

12 Q. Can you explain why not?

13 A. There's a number of reasons. There's always sort of a
14 tension between what would be the ideal pricing and then
15 keeping things reasonably simple for our users.

16 So we don't want to change the prices too often. We'd
17 also like to avoid having a third price point between IOS and
18 Android.

19 And there's also been a lot of changes in the past few
20 years perhaps as a result of this litigation. So we're not
21 confident this is sort of the final price point, and so we
22 don't want to keep changing that price on our users over and
23 over again.

24 Q. Does Down Dog ever offer discounts or sales on
25 subscriptions?

1 **A.** We do. Typically it's been two to four times a year we'll
2 do a big sale. The biggest is around New Year's when people
3 get excited about fitness.

4 **Q.** What do you mean by "big sale"? Like, how much do you
5 offer the subscriptions for?

6 **A.** Typically the price during the sales is \$19.99 per year.

7 **Q.** And do you offer that sale price on both the website and
8 on the Android app downloaded through Google Play?

9 **A.** No. Typically the sale prices are only offered on our
10 website.

11 **Q.** Why is that?

12 **A.** At the time of a sale we're sort of trying to set the
13 price as cheap as we possibly can and communicate a single
14 price. So we actually don't even do a monthly discount for the
15 sales. We just do the single 19.99 per year price point. And,
16 again, we're trying to set that as low as we can so we can't
17 afford to also hand over a significant percentage to Google or
18 Apple.

19 **Q.** So if a user signs up on the website, lower price there on
20 the right for 7.99, what platforms do they get to use to
21 actually take the yoga classes and other things you offer?

22 **A.** They can use any of the platforms. Just log in with the
23 same e-mail address that they use to purchase, but they can use
24 that on Android, IOS, or on the web.

25 **Q.** And what about somebody who signs up on the Android app?

1 Where can they take yoga classes and the like for the amount
2 that they pay?

3 **A.** Same thing, within the Android app, within the IOS app, or
4 on the web.

5 **Q.** So is there a difference between the content that someone
6 gets, like different classes or something, the lower price
7 versus the higher price?

8 **A.** No.

9 **Q.** So why does anybody ever sign up for the higher price on
10 Android?

11 **A.** We're now no longer even allowed to communicate the option
12 of the website price within the Android app. So presumably
13 many of the Android users don't even know that the website
14 discount is available.

15 **Q.** What do you mean you're not able to communicate the lower
16 price within the Android app?

17 **A.** I believe in the fall of 2020 Google clarified their
18 payments policy and said that in addition to having the in-app
19 billing -- the Google Play in-app billing option, we were
20 prohibited from directing or mentioning any other payment
21 options to our users from within the Android app. We are still
22 able to e-mail them, which is presumably how the users who do
23 subscribe on the website but download the Android app find out.

24 **Q.** So before this new thing in the Google's payment policy,
25 did Down Dog actually tell its users in the Android app that

1 they were able to go to the web and sign up there?

2 **A.** Yes. Until fairly recently on the purchase page they
3 would see this in-app pricing and then there would also be a
4 big button that said they could get 33 percent off if they
5 purchased on our website, and clicking that button would take
6 them to the purchase page on our website.

7 **Q.** You should have a binder in front of you there with some
8 documents in it. Can you turn to the document that's labeled
9 Exhibit 8028?

10 **A.** Okay.

11 **Q.** Can you describe what that document is, please?

12 **A.** Yeah. This is the purchase page inside our Android app
13 before we were forced to remove the link to our website.

14 **MR. BORNSTEIN:** Your Honor, I'd move Exhibit 8028 into
15 evidence.

16 **MR. KRAVIS:** No objection.

17 **THE COURT:** It's admitted.

18 (Trial Exhibit 8028 received in evidence.)

19 **MR. BORNSTEIN:** Great. Can we publish that, please?
20 Thank you.

21 **Q.** All right. You were describing what we see here. Now
22 that the jury can see it again, can you just explain one more
23 time what we're looking at, please?

24 **A.** Yeah. So this is the purchase page within the Android app
25 where we're showing the yearly and monthly options if they

1 choose to use Google Play in-app billing, which is the large
2 blue button you can see that says "Pay with Google." And then
3 if they were to click the white button below that says
4 "33 percent off pay on our website," that would open the
5 browser on their phone and they would see the website pricing
6 where they'd have the option for PayPal or credit card.

7 **Q.** So during the time that your Android app looked like this
8 where that link was available to go to the website, how many of
9 your users actually clicked the 33 percent off pay-on-the-
10 website button versus pay with Google?

11 **A.** So when we had both of the options clearly listed in the
12 app, only 10 percent of Android users chose to use Google Play
13 in-app billing.

14 **Q.** And so 90 percent went for the cheaper choice on the
15 website?

16 **A.** That's correct.

17 **Q.** Now, you referenced that at some point there was a change
18 in Google's policy that required you to remove that link;
19 correct?

20 **A.** That's correct.

21 **Q.** Did Google give a reason to you for why you had to take
22 that link down?

23 **A.** I'm not totally sure. At the time I feel like they
24 clarified the policy trying -- sort of saying this was always
25 the policy; but it hadn't been clear to us, or apparently

1 others, that this was actually the policy and they had never
2 taken any enforcement against us before that.

3 **Q.** Did you complain about this to Google?

4 **A.** We did. We had an investor at the time who knew the VP of
5 Google Play, and so we asked him to reach out to her and find
6 out if this was really the plan.

7 **Q.** And why did you complain?

8 **A.** I was honestly very surprised that Google was going to go
9 down this path. Their supposed mission is to organize the
10 world's information and make it universally accessible and
11 useful. And as far as I could tell, this was the first and
12 only instance across any of their products where they were
13 prohibiting the spread of information that was clearly true and
14 relevant and not inappropriate or illegal in any way. So that
15 was shocking to me as a former Google employee who started my
16 career there.

17 And so I thought there was a real chance that not everyone
18 at Google really knew this is what was going on and that maybe
19 this was like a small app review team that was making a
20 mistake.

21 **Q.** Did you have any information about how this might affect
22 your users and your subscribers going forward?

23 **A.** When they announced this policy change, we decided to run
24 an experiment to find out sort of exactly what was the impact
25 going to be when we removed this link.

1 Q. Would you explain what kind of experiment you're talking
2 about?

3 A. Yeah. So typically in the industry this is called an AB
4 test where new users when they came to the app were randomly
5 assigned to one of two treatment groups. So in this case
6 90 percent of users saw this normal -- what was the normal
7 treatment at the time, which was to see the website purchase
8 link, and then a random 10 percent of users during that time
9 were not shown the website purchasing link so that we could
10 compare the behavior of the two sets of users.

11 Q. What were the results of the experiments?

12 A. So we saw that, as I said already, when they see the link,
13 90 percent of Android users choose to purchase on the website.
14 So that's what happened with the control group. And then in
15 the testing group we saw that that dropped to just a little
16 over 50 percent subscribed on our website. But, more
17 importantly, we saw that there was a 28 percent reduction in
18 the number of users who subscribed at all.

19 Q. And to what do you attribute that?

20 MR. KRAVIS: Objection. Calls for speculation.

21 THE COURT: Overruled.

22 Go ahead.

23 THE WITNESS: Presumably --

24 THE COURT: I'm sorry. 28 percent reduction in what?

25 THE WITNESS: So in the number of users who

1 subscribed. So for every download -- or sorry. For every
2 person who created an account, if they weren't shown this page,
3 there were 28 percent fewer actually chose to pay us.

4 **THE COURT:** I'm sorry. Go ahead.

5 **BY MR. BORNSTEIN:**

6 **Q.** So the question had been: To what do you attribute the
7 28 percent reduction that you just described to the Court?

8 **A.** Presumably some users were to only be willing to subscribe
9 on the website I would guess because of the lower price,
10 although it could also be that some users don't want to use
11 Google in-app play billing.

12 **Q.** So when Google enforced this policy against Down Dog, what
13 did you have to do to comply?

14 **A.** At first all we had to do was remove the 33 percent off
15 button that we're looking at.

16 **Q.** And was there anything else that you subsequently had to
17 do to comply?

18 **A.** Yes. They later made us remove some links that were on
19 the FAQ page of our website because from within the Android
20 app, we have a link to get to the FAQ page, which opens in the
21 user's browser; and then from the FAQ page, there were links to
22 our -- the purchase page on our website. And so they
23 eventually made us remove some of those links as well.

24 **Q.** So you changed the app and then you also had to change
25 your website itself on the computer?

1 A. That's correct.

2 Q. And what was the actual impact on Down Dog from these
3 changes?

4 A. So it's sort of impossible to know for sure. Like, our
5 subscription rate has gone down, but that could be for a number
6 of factors. That's why we did the experiment. To us that's
7 the best way to do that analysis.

8 What I can say is that since this change when we no longer
9 have the app, the link in our app, the proportion of Android
10 users who subscribe on the website has fallen to that same a
11 little over 50 percent from the original 90 percent.

12 Q. What's your view on Google's restrictions against
13 informing users of the cheaper purchase option within the app?

14 A. I think it's intentionally misleading users, and they're
15 sort of making us complicit in that misdirection.

16 Q. So why did you agree to it?

17 A. We feel like we have to be on Android to reach roughly
18 half of consumers.

19 Q. Can you turn -- Mr. Simon, there's another document in
20 your binder. It's Exhibit 8022.

21 A. Okay.

22 Q. Do you recognize what this document is that we're looking
23 at here?

24 A. Yeah. This is the developer program policy for, I
25 believe, to be listed in the Google Play Store.

1 **MR. BORNSTEIN:** I would move Exhibit 8022 into
2 evidence, Your Honor.

3 **MR. KRAVIS:** No objection.

4 **THE COURT:** 8022 is admitted.

5 (Trial Exhibit 8022 received in evidence.)

6 **BY MR. BORNSTEIN:**

7 **Q.** All right. So is this the policy that Down Dog needs to
8 comply with in order to be on the Google Play Store?

9 **A.** I believe that's correct.

10 **Q.** All right. Let me ask you to turn, Mr. Simon, to the page
11 that ends with numbers 039.

12 **A.** Okay.

13 **Q.** If you look on this page about half way down, there's --
14 actually a little further down -- Item Number 4.

15 **A.** Okay.

16 **Q.** It says (as read):

17 "Other than the conditions described in Section 3 and
18 Section 8, apps may not lead users to a payment method
19 other than the Google Play's billing system."

20 Do you see that there?

21 **A.** I do.

22 **Q.** And is -- to your understanding, is this the policy of
23 Google's that required you to take down that link and make
24 those changes to your website?

25 **A.** Yes, it is, although I don't really think this policy by

1 itself should have necessitated having to change our website.

2 Q. But it did?

3 A. Yes.

4 Q. I want to switch to a different subject, Mr. Simon.

5 You said earlier that people who sign up on your website
6 can use their credit card; correct?

7 A. That's correct.

8 Q. Does your users' credit card information ever reach
9 Down Dog itself?

10 A. No. So the way that Stripe, our payment processor, works
11 is they collect the credit card number. It goes directly from
12 the user's browser to Stripe's servers. We never see the
13 number at all. And then Stripe sends us a message basically
14 telling us this user has paid this amount so that we can credit
15 their account.

16 Q. Do you like that arrangement?

17 A. Definitely.

18 Q. How come?

19 A. It takes away a bunch of risks on our side of accidentally
20 misusing credit cards or an employee making a mistake. There's
21 also legal requirements, I believe, once you're storing
22 information such as credit cards, and so basically Stripe takes
23 care of all of that for us.

24 Q. Have you ever had any kind of security issue arise from
25 users who subscribed on the web rather than Android?

1 **A.** No.

2 **Q.** And in your view, taking everything into account from your
3 perspective, which service provides a better payment solution
4 for Down Dog? Stripe or Google Play Billing?

5 **A.** Stripe.

6 **Q.** And what about PayPal or Google Play Billing?

7 **A.** PayPal.

8 **Q.** And so if you had the ability at Down Dog to use PayPal or
9 Stripe on your Android app, would you do so?

10 **A.** Yes.

11 **Q.** Have you at Down Dog ever considered just abandoning the
12 Google Play Store?

13 **A.** Not seriously, no.

14 **Q.** Why not?

15 **A.** You know, every -- roughly -- almost every consumer has an
16 Android phone or an IOS phone. Almost no one has both. There
17 is -- there does seem to be a small number of consumers who
18 have an Android phone and an iPad. But to reach -- to reach
19 all of our consumers, we feel like we have to reach Android
20 users and, for better or for worse, they seem to be trained to
21 look in the Google Play Store as the place where they get and
22 download apps.

23 **Q.** Did you ever distribute the Down Dog apps on Android in
24 some other store?

25 **A.** Yes. Very early on we also listed ourselves in the Amazon

1 Android app store.

2 Q. And do you still list them there or no?

3 A. No. We haven't for several years.

4 Q. Why did you stop listing your apps in the Amazon app store
5 on Android?

6 A. It got essentially no downloads, and we would forget to
7 even post the latest update there so we eventually decided it
8 just wasn't worth it.

9 Q. Can Android users go directly to the Down Dog website and
10 download your app onto their Android devices?

11 A. They cannot.

12 Q. And why do you not offer your users that option?

13 A. Technically that would be very easy for us to implement,
14 but it's not something that a user has ever asked for. I
15 think -- again, I think, for better or worse, they've been
16 trained that the Play Store is where they should download and
17 install apps from.

18 Q. Are there any obstacles that you're aware of that users
19 face when they try to download an app from a website on
20 Android?

21 A. Yeah. I'm not sure about the latest behavior, but I
22 believe there's always been a series of dialogues to approve
23 installing an untrusted piece of software.

24 Q. Are you familiar with something called a web app?

25 A. Sure.

1 Q. Can you just at a very high, nontechnical level, I know
2 you're an engineer, but at a very high level, what is a web
3 app?

4 A. Usually that just refers to a website that has a
5 sufficient level of functionality beyond just displaying a
6 static page.

7 Q. And could Down Dog use web apps as a substitute for
8 distributing its app on the Google Play Store on Android?

9 A. So we do have a fully functioning web app; however,
10 particularly on mobile devices there are some technical
11 restrictions, which early on actually prevented us from the
12 Down Dog app working at all on mobile devices. But even today,
13 there are performance issues. We also can't do push
14 notifications.

15 And another one that's kind of important to us is that we
16 have the ability for users to download practices so they can
17 use them when they're offline. So, for example, if someone
18 wants to do yoga in the middle of the woods while they're
19 camping and there's no download or offline functionality that
20 we can implement as a web app.

21 Q. Completely different subject, Mr. Simon. Does Down Dog
22 have a Twitter account or maybe I should say an X account?

23 A. We do.

24 Q. Okay. And do you post on that account yourself?

25 A. I have.

1 Q. Have you ever posted anything about Epic Games on your
2 account?

3 A. Yes. I believe when they started this litigation, we
4 retweeted something of theirs and said something along the
5 lines of "Go, Epic. Tim Sweeney's our hero."

6 Q. And Tim Sweeney is who?

7 A. He's the CEO of Epic.

8 Q. Why did you call him your hero?

9 A. At the time this was especially an issue that it seemed
10 like anyone who wasn't a developer sort of didn't even know
11 about. When we would talk to our users, they would be very
12 surprised to find out that Apple and Google both took these
13 large percentages and forbid us having other options. So I was
14 very happy to see this be made more public, and it also seemed
15 like Epic was willing to spend a lot of money litigating this
16 on behalf of all developers and consumers.

17 Q. Do you know Mr. Sweeney personally?

18 A. I do not.

19 Q. Have you ever spoken to Mr. Sweeney?

20 A. I have not.

21 Q. Have you been offered anything by Mr. Sweeney or Epic
22 generally to come to testify today?

23 A. I have not.

24 Q. So why are you here?

25 A. I think these policies are bad for us and our users and me

1 personally as a consumer. I honestly think they're bad for
2 Google in the long run, so I'm happy to do whatever I can to
3 help change them.

4 **MR. BORNSTEIN:** I have no further questions.

5 **THE COURT:** Okay. Pass the witness.

6 **CROSS-EXAMINATION**

7 **BY MR. KRAVIS:**

8 **Q.** Mr. Simon, you testified on direct examination about the
9 service fee that the Google Play Store charges for purchases of
10 subscriptions inside your apps. Remember that?

11 **A.** I do.

12 **Q.** Mr. Simon, as of about two months ago, you did not even
13 know the amount of the service fee that the Google Play Store
14 charges your company, did you?

15 **A.** There have been many changes and there are lots of
16 numbers, so it is correct that at my deposition I forgot that
17 the subscription fee had been lowered from 30 to 15 percent
18 across the board.

19 **Q.** In fact, at your deposition you told me four times that
20 Google charges you a service fee of 30 percent on your
21 subscriptions in the first year; correct?

22 **A.** That sounds correct.

23 **Q.** In fact, the Google Play Store charges you a service fee
24 of 15 percent, half that, every year of the subscription;
25 right?

1 A. Since they changed their policy a year ago, yes, that's
2 true.

3 Q. And that is a lower service fee than the Apple App Store
4 charges you for the first year; right?

5 A. For the first year, I believe that's correct.

6 Q. So let's just flesh that out a little bit.

7 The Down Dog apps are -- you said there's six of them;
8 right?

9 A. Correct.

10 Q. And those apps are available in the Google Play Store;
11 right?

12 A. Correct.

13 Q. So an Android user can go to the Google Play Store and
14 download one of the six Down Dog apps; right?

15 A. That's correct.

16 Q. And then that Android user having downloaded the app can
17 open up the app and buy a subscription inside the app; right?

18 A. That's correct.

19 Q. And on that transaction you pay a service fee to the
20 Google Play Store; correct?

21 A. That's correct.

22 Q. Now, the Down Dog apps are also available in the Apple App
23 Store; correct?

24 A. That is correct.

25 Q. And that means that an iPhone user can go to the Apple

1 App Store and download one of those six Down Dog apps; right?

2 A. Correct.

3 Q. And then the iPhone user can open up the app that they
4 downloaded from the Apple App Store and they can purchase a
5 subscription inside that app; right?

6 A. That is correct.

7 Q. And just like the Google Play Store, the Apple App Store
8 charges a service fee on those purchases of subscriptions
9 inside the app; right?

10 A. That is correct.

11 Q. Apple collects a service fee of 30 percent on the
12 subscription in the first year; right?

13 A. I believe that's correct.

14 Q. And then after that, in subsequent years, it goes down to
15 15 percent; correct?

16 A. I believe that is correct.

17 Q. The Google Play Store collects a service fee of 15 percent
18 in every year; right?

19 A. I believe that is correct.

20 Q. And, by the way, even though the Google Play Store charges
21 you a lower service fee, you charge the same subscription price
22 in the Google Play Store and the Apple App Store; correct?

23 A. Again, we set this pricing when Google was charging
24 30 percent.

25 Q. Since the time that the Google Play Store has lowered the

1 service fee from 30 percent to 15 percent, you have not changed
2 the price of the subscription in the Android version of the
3 app; correct?

4 **A.** Correct. Again, we don't want to change the prices on our
5 users too often.

6 **Q.** While we're on the subject of Apple, Down Dog made its
7 apps available on IOS -- sorry.

8 You know what IOS is; right?

9 **A.** I do.

10 **Q.** IOS is the operating system for the iPhone; right?

11 **A.** That's correct.

12 **Q.** Down Dog made its apps available on IOS before Down Dog
13 made its apps available on Android; right?

14 **A.** I believe about six months passed between the launch of
15 our IOS app and the launch of the Android app.

16 **Q.** And when you were starting out, it was just a two-person
17 team; right?

18 **A.** That's correct.

19 **Q.** And you had to start somewhere; right?

20 **A.** That's correct.

21 **Q.** And you chose to start with IOS; right?

22 **A.** We did.

23 **Q.** The Android versions of Down Dog's apps are free to
24 download from the Google Play Store; right?

25 **A.** That's correct.

1 Q. In other words, that Android user I was talking about a
2 moment ago who opens up the Play Store and finds one of the
3 apps, the user does not have to pay any money to download one
4 of your apps from the Play Store; right?

5 A. That's correct.

6 Q. And it is Down Dog's decision not to charge Android users
7 an upfront fee to download the apps; correct?

8 A. Sorry can you repeat the question?

9 Q. Yeah.

10 It is your decision -- it is Down Dog's decision not to
11 charge an Android user an upfront fee to download one of the
12 Down Dog apps; correct?

13 A. Yes, that's correct.

14 Q. And part of the reason that Down Dog chooses not to charge
15 users to download its apps is because you want users to be able
16 to try out the app before they have to pay any money; right?

17 A. That's correct.

18 Q. Now, as we were talking about a moment ago -- well, let me
19 start here.

20 Down Dog began distributing Android versions of its apps
21 around spring of 2016. Does that sound about right?

22 A. It does.

23 Q. And as we were talking about a moment ago, in late 2021,
24 early 2022, Google lowered its service fee on subscriptions to
25 15 percent; right?

1 A. That sounds correct.

2 Q. And when Google lowered its service fee for subscriptions
3 to 15 percent, Down Dog did not lower the price it charges for
4 subscriptions in apps downloaded from the Google Play Store;
5 right?

6 A. No. Again, there's a tension between simplicity and ideal
7 pricing, and we don't have confidence this is the final price
8 point.

9 Q. In other words, what happened here was Google lowered its
10 service fee, and you did not lower your price; correct?

11 A. Not yet. No, we have not.

12 Q. Now we've been talking about the apps. You also sell
13 subscriptions on your website; right?

14 A. Correct.

15 Q. And a user who buys a subscription on your website can use
16 that subscription in the Android version of the app; right?

17 A. That is correct.

18 Q. They can also use it in the IOS version of the app; right?

19 A. That is correct.

20 Q. So, in other words, the Android user we were talking about
21 who goes to the Google Play Store and downloads one of your
22 apps, they can then open the app and use a subscription that
23 they bought on your website inside the app; right?

24 A. Correct.

25 Q. And when the customer chooses -- when the customer behaves

1 that way, when they buy the subscription on your website and
2 then they use the subscription in the Android version of the
3 app, Down Dog does not pay a service fee to the Google Play
4 Store; correct?

5 **A.** Down Dog does not pay anything directly related to that
6 payment, that's correct.

7 **Q.** Now, Down Dog receives a benefit from having its apps in
8 the Google Play Store; right?

9 **A.** Yes, primarily that would show up in search traffic.

10 **Q.** So the Google Play Store provides Down Dog with a platform
11 to distribute its apps to Android users; right?

12 **A.** It does.

13 **Q.** In fact, the Play Store allows Down Dog to reach millions
14 of Android users with its apps; right?

15 **A.** Yes, much the same way that Google web search allows users
16 to find our web app.

17 **Q.** Right, exactly.

18 And when a user purchases a subscription on your website
19 and then uses that subscription in an app of yours that they
20 found in the Play Store, you are getting the benefit of having
21 your apps in the Play Store without paying Google any service
22 fee; correct?

23 **A.** I wouldn't agree with that characterization because we've
24 paid for it to run ads on the Google Play Store so we've paid
25 that way; and also other competitors run ads against searches

1 for Down Dog, so Google gets paid for that as well.

2 **Q.** Right. I'm not asking you about the ad revenue. I'm
3 asking you about the service fee.

4 When a user buys a subscription on the website and
5 downloads your app from the Play Store and uses the
6 subscription in the app, you do not have to pay Google a
7 service fee; correct?

8 **A.** We do not pay Google directly for that payment, no.

9 **Q.** And, in fact, about 50 percent of your revenue comes from
10 subscriptions sold through your website; right?

11 **A.** That sounds roughly correct.

12 **Q.** In fact, about 10 to 20 percent of your revenue comes from
13 subscriptions sold in Android apps; right?

14 **A.** I'm not sure the numbers are correct since we removed the
15 link, but they sound roughly -- roughly in line.

16 **Q.** Now, you testified on direct examination about being
17 unable to tell your customers about lower prices inside the
18 app. Do you remember that?

19 **A.** I do.

20 **Q.** But you are allowed to tell your customers about those
21 lower prices outside the app; right?

22 **A.** That was our understanding, though they have made us
23 remove some of the links at least. I guess they didn't make us
24 remove the mention of the website purchase option.

25 **Q.** Yeah, well, let's be clear about this.

1 You can e-mail your customers; right?

2 **A.** That's correct.

3 **Q.** I think you testified a moment ago that when a customer
4 creates an account, they type in their e-mail address; right?

5 **A.** That's correct.

6 **Q.** So you have your customers' e-mails; right?

7 **A.** That's correct.

8 **Q.** And you are allowed to e-mail them to advertise the lower
9 price on your website; correct?

10 **A.** That's correct.

11 **Q.** In fact, the Google Play Store has like a whole policy
12 about how you're allowed to contact your customers to tell them
13 about the lower prices on your website, don't they?

14 **A.** I'm not sure I would characterize that as a whole policy,
15 but I do think that's expressly allowed.

16 **Q.** Okay. I just want to ask you a couple of questions.

17 Open up one of the binders. It's the second one there.
18 Okay? Yep.

19 I want you to open the tab that is 5462. Exhibit 5462.
20 Are you with me?

21 **A.** I am.

22 **Q.** I'm not asking to publish at this point. I just want to
23 ask: Mr. Simon, have you seen this web page before?

24 **A.** (Witness examines document.) I'm not totally sure. I
25 believe I have.

1 Q. So you have seen this before?

2 A. I think so, but it could have been a different Apple
3 developer, a blog post.

4 Q. Well, let me direct your attention to a specific portion
5 of it since you've seen it before. Can you turn to page 2,
6 please? It's on the backside.

7 A. (Witness examines document.) Okay.

8 Q. Do you see the subheading there that says "Communicating
9 With Customers"?

10 A. I do.

11 Q. How about that part? Have you seen that part before?

12 A. I don't remember if I've seen this exact paragraph but,
13 sure.

14 Q. Well, I'd just like a -- if you haven't seen it, it's
15 okay. I'm just asking yes or no. Have you seen it before or
16 no?

17 A. I don't recall.

18 Q. Okay. That's fine.

19 Take a look at the next one, Exhibit 6376. It should be
20 the next tab in the binder.

21 A. Okay.

22 Q. Same question here. Have you seen this website before?

23 A. Again, I've definitely been on this Play Console Help
24 Center. I'm not sure if I read this exact article.

25 Q. Let me direct you to a specific portion again. Again, all

1 I want to know is whether you've seen this or not.

2 If you can turn to page 2 of the exhibit, please. Do you
3 see the heading that says "Frequently Asked Questions"?

4 **A.** I do.

5 **Q.** And do you see the third question down says "Can I
6 communicate with my users alternative ways to pay?" Do you see
7 that?

8 **A.** I do.

9 **Q.** Have you seen this question and answer before? Have you
10 looked at this?

11 **A.** I've at least seen something that's substantively the
12 same.

13 **Q.** So you have seen this portion of the website before?

14 **A.** Again, I'm not sure I read these exact four paragraphs or
15 if I read something similar on a different page of the website
16 or in many e-mails that we've gotten from Google related to
17 these topics.

18 **Q.** That's fine. We'll come back to it. You can set it
19 aside.

20 Just to make sure I'm clear on what I've heard from you,
21 Google Play -- the Google Play Store charges you a service fee
22 of 15 percent? It's not 30 percent, 15 percent; right?

23 **A.** As of 2022, that's correct.

24 **Q.** And that service fee is lower than the service fee the
25 Apple App Store charges you; right?

1 **A.** Only for the first year but, yes, that's correct.

2 **Q.** And when Google lowered its service fee in October 2021,
3 January 2022, you did not lower the price of subscriptions in
4 your Android apps; right?

5 **A.** We have made no alterations to our pricing in that period,
6 no.

7 **Q.** Thank you, Mr. Simon.

8 **MR. KRAVIS:** I have no further questions.

9 **THE COURT:** Brief redirect?

10 **MR. BORNSTEIN:** No, Your Honor.

11 **THE COURT:** Okay. Any questions for this witness?
12 Yes, if you would pass that to Ms. Clark, please.

13 (Pause in proceedings.)

14 **THE COURT:** All right. I will ask this question.
15 The question is: How is pricing presented in IOS?

16 **THE WITNESS:** So on IOS we've never been allowed to
17 include the link. So it's basically the same page that we were
18 looking at but without that final white button saying that they
19 have the website purchase option.

20 **THE COURT:** Okay. So this is part two of the
21 question. You may have just answered, but let me ask: Is the
22 web option shown in app in IOS?

23 **THE WITNESS:** No. So Apple has never allowed that.

24 **THE COURT:** Okay. Thank you.

25 All right. Careful on the way down.

1 **THE WITNESS:** Thank you.

2 (Witness excused.)

3 **THE COURT:** Well, let's see, who's next?

4 **MR. BORNSTEIN:** Your Honor, given the timing, we were
5 thinking about playing a deposition next. The deposition
6 clip --

7 **THE COURT:** Is it 15 minutes?

8 **MR. BORNSTEIN:** The full clip is 50, five zero,
9 Your Honor.

10 **THE COURT:** All right.

11 **MR. BORNSTEIN:** We can either play part or not subject
12 to your preference.

13 **THE COURT:** I'll tell you what. It's day one, we're
14 just adjusting so why don't we end today right now. Okay?

15 We'll see you tomorrow morning at 9:00 a.m., and we'll get
16 together then.

17 Now, before you go, this is what we're going to talk about
18 every day. We already started last week. I'm going to remind
19 you every day.

20 Once you walk through this door into the jury area, put
21 all of this out of your mind. Don't think about it. Don't
22 reflect on it. Don't make any decisions. Don't do any
23 research. Don't look at anything. There is media coverage.
24 You must be careful you do not read it or hear it or see it.

25 So I'll see you tomorrow morning with a clean slate, and

1 I'll see you at 9:00 o'clock.

2 **MR. POMERANTZ:** Your Honor? Your Honor, I'm sorry, I
3 don't mean to interrupt and stop the jurors from leaving, but I
4 think one of the jurors asked about Election Day, which is
5 tomorrow.

6 **THE COURT:** Oh, that's tomorrow.

7 Okay. Well, who's voting in person? Anybody? Anybody
8 planning on going to a polling place in person?

9 (No response.)

10 **THE COURT:** Oh, we're good.

11 **MR. POMERANTZ:** There you go.

12 **THE CLERK:** All rise.

13 **THE COURT:** Leave your binders. Don't leave them
14 here, but put it on the table and don't take them home.

15 (Proceedings were heard out of the presence of the jury:)

16 **THE COURT:** Okay. At the end of each day, there will
17 be a stack for you. This is what I'm returning. Okay? It
18 won't be everything, but it will be a lot of things.

19 **THE CLERK:** You may be seated.

20 **THE COURT:** Well, I'll see you in the morning unless
21 there's anything you want to take up. Is there anything to
22 take up?

23 **MR. BORNSTEIN:** Your Honor, I have one very quick
24 request if I could.

25 **THE COURT:** Sure.

PROCEEDINGS

1 **MR. BORNSTEIN:** Which is I understand there were a
2 couple of awkward encounters in the hallway with jurors and
3 members of the team where people were being very careful not to
4 speak to the jurors, and I wonder if it would be helpful if
5 Your Honor could let the jurors know that neither side is not
6 being rude to them by not interacting with them in the hallway,
7 but that we're not allowed to.

8 **THE COURT:** We'll take care of it.

9 **MR. BORNSTEIN:** Okay. Very good.

10 **THE COURT:** It's a standard thing. I'm sure nobody
11 took any offense.

12 **MR. BORNSTEIN:** Thank you, Your Honor.

13 **MR. POMERANTZ:** Your Honor, one other thing just by
14 way of explanation.

15 Sometimes you're seeing multiple transcripts because some
16 of them come from the Apple litigation. We're not mentioning
17 that.

18 **THE COURT:** Well, I didn't know you were doing that
19 until I saw the cover sheet.

20 **MR. POMERANTZ:** Right. We're not mentioning that, but
21 we're just -- I think by agreement of the parties we're simply
22 saying it's another transcript.

23 **THE COURT:** That's fine. Insider code about Volume 3;
24 and if you say it's in the second document, just say that.

25 **MR. POMERANTZ:** Okay. Thank you, Your Honor.

PROCEEDINGS

1 **THE COURT:** Okay. I'll see you in the morning.

2 **MR. BORNSTEIN:** Thank you, Your Honor.

3 **THE CLERK:** Court's in recess.

4 (Proceedings adjourned at 3:16 p.m.)

5 ---oOo---

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7
8 **CERTIFICATE OF REPORTER**

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11
12 DATE: Monday, November 6, 2023

13
14
15 
16 _____
17 Kelly Shainline, CSR No. 13476, RPR, CRR
18 U.S. Court Reporter